

INDEX TO APPENDIX

	Page
Information (Vio. Sec. 11532 H. & S. Code)	1
Minutes of April 5, 1967	2
Transcript of Proceedings	3
April 5, 1967	
Porter, Melvin John	
—Direct	3
—Cross	23, 56
—Redirect	61
Wade, Barry M.	
—Direct	27
—Cross	38
—Redirect	41
Dominguez, Ramon	
—Direct	43
—Cross	54
Blackmore, Daniel	
—Direct	69
Smutz, Robert	
—Direct	70
Davis, Harry Lanier	
—Direct	71
April 6, 1967	
Green, John Anthony	
—Direct	75
—Cross	79
—Recross	95
—Redirect	96

	Page
Minutes of April 7, 1967	91
· Declaration of Melvin John Porter	99
Order Granting Probation, May 19, 1967	101
Notice of Appeal	103
Opinion of the Supreme Court of the State of California	104
Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	119

IN THE
Supreme Court of the United States
October Term, 1969

No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN.

ON WRIT OF CERTIORARI TO SUPREME COURT
OF CALIFORNIA.

APPENDIX.



INFORMATION.

VIO.SEC. 11532 H.&S. Code.

Superior Court of the State of California for the County of Los Angeles.

The People of the State of California, Plaintiff, v. John Anthony Green, Defendant. S. C. No., No. A-101,149.

The said JOHN ANTHONY GREEN, a person of the age of 25 years is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 11532, Health and Safety Code, a felony, committed as follows: That the said JOHN ANTHONY GREEN, a person of the age of 25 years on or/between the 1st day of January, 1967 and about the 10th day of January, 1967 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously sell, furnish, administer and give to Melvin Porter, a minor of the age of 16 years, a narcotic, to wit, marijuana.

EVELLE J. YOUNGER, District Attorney for the County of Los Angeles, State of California
By /s/ R. Paul Esnard
R. Paul Esnard, Deputy

Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County.

Dated: Feb. 23, 1967, William G. Sharp, Clerk by W. H. Cox, Deputy.

MINUTES.

Superior Court of the State of California for the
County of Los Angeles Department No. 77.

Apr. 5, 1967.

The People of the State of California vs. John An-
THONY GREEN Case No. A101149.

APPEARANCES: (Parties and Counsel checked if
present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by James Ide-
man, Deputy E. J. Hovden, Public Defender, by
Deputy.

X Terrance W. Cooney.

Cause, transferred from Department 120, is called for
trial, the jury having been heretofore waived. Melvin
John Porter, Harry M. Wade and Ramon Dominguez
are sworn and testify for the People. The People's Ex-
hibit 1 (package of marijuana) is admitted in evidence.
The People rest. Daniel Blackmore, Robert Smut and
Harry Lanier Davis are sworn and testify for the De-
fendant. Trial is continued to April 6, 1967 at 9:30
A.M. Bail.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

April 5, 1967.

MELVIN JOHN PORTER, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Take the stand and state your name, please.

THE WITNESS: Melvin John Porter.

THE CLERK: Will you spell the last name, please.

THE WITNESS: P-o-r-t-e-r.

MR. IDEMAN: Your Honor, I move at this time to exclude all witnesses except for the investigating officer.

THE COURT: Any objection?

MR. COONEY: No objection.

THE COURT: All right.

All persons who are going to testify in this case, please remain in the hallway outside of the courtroom.

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Melvin, how old are you?

A Seventeen.

THE COURT: Speak up, and keep your voice loud and clear.

THE WITNESS: Seventeen.

Q BY MR. IDEMAN: When is your birthday, Melvin?

A March 26th. [11]

Q Back in January of this year, 1967, you were 16 years old; is that right?

A Yeah.

Q Where do you live, Melvin?

A 20809 Bassett, Canoga Park, California.

Q Speak up, please.

THE COURT: Pull the microphone close to you, and sit back and speak right into the microphone.

THE WITNESS: 20809 Bassett.

Q BY MR. IDEMAN: Mr. Porter, do you know the defendant, Mr. Green?

A Yeah.

Q How long have you known him?

A Ever since I lived there in the neighborhood about—let's see—close to about 4½ years.

Q Where does he live?

A Well, he—when I first met him, he had lived down at the corner of Bassett and Gazette.

Q And what?

A At the corner of Bassett and Gazette.

Q Now, Melvin, in January of 1967 did you live there?

A Yeah.

Q Did he live somewhere else?

A He lived at somebody else's house.

Q Do you know where that is? [12]

A I think it was Wayne Kruse—I think that's—I think it was Wayne Kruse's.

Q Where was this?

A On Cozycroft.

Q Was that near your house?

A Oh, about—well, I think five or ten minutes to walk there from my house.

Q How old is he; do you know?

A Twenty-four, I think.

Q Now, Melvin, have you used marijuana in the past?

A Yes, I have.

Q Have you used LSD?

A Yes, a couple of times.

Q How long have you used marijuana?

A Oh, before I was arrested about two—maybe two and a half months.

Q You were arrested in late January, 1967; is that correct?

A Yeah.

Q Now, sometime between the—sometime in early January did you have a conversation with Mr. Green?

A Yeah, he called me up.

Q Now, about when did he call you up in relation to let's say to New Year's Day? How long after that?

[13]

A I really couldn't say. I know it was pretty close to the first of the year.

Q Sometime between the 1st and the 10th, would that be a fair statement?

A Hmm, that would be about right.

Q Did he call you at your home?

A Yeah, I think so, yes.

Q Did you speak with him on the telephone?

A Yes.

Q Did you recognize his voice?

A Oh, yeah, I guess I knew it was him; I guess.

Q You had spoken to him before on the telephone?

A Yeah.

Q Did you have a conversation concerning narcotics?

A Well, he called me up, and he just said that he had some stuff he wanted me to sell.

Q Now, Melvin, what does "stuff" mean as far as narcotics are concerned?

MR. COONEY: Objection, your Honor. It could mean anything. Object to the form of the question.

MR. IDEMAN: Well, I'll withdraw the question.

THE COURT: All right. The question is withdrawn.

Q BY MR. IDEMAN: Melvin, have you associated [14] with other people that have used marijuana or other narcotics?

A Yes, I have.

Q Speak up, Melvin.

A Yeah.

Q Have you heard the word "stuff" used?

A Not very often. I usually call it grass or pot, or something like that.

Q And what does that mean?

A Grass or pot, marijuana.

Q All right, Melvin, what did the defendant tell you over the telephone?

A He just said he had some stuff he wanted me to sell.

Q Did he say what it was?

A No, he just said "stuff."

Q Tell us the details of the conversation as you remember them.

A Well, that's about the whole thing. He just called me up, and he said, you know, "I've some stuff I want you to sell."

Q And what did you say?

A I said, "Yeah, I guess so," you know.

Q Had you ever talked about narcotics with the defendant before that date?

A We might have discussed it, you know. [15]

Q Had you ever discussed your selling any?

A No.

Q What did you do, if anything, after this telephone conversation with the defendant as far as this is concerned, selling the stuff?

A Oh, I just—that was it. I just messed around for a while.

THE COURT: Just a moment; what was that answer?

Read back the answer, Miss Reporter.

(Answer read by the reporter.)

THE WITNESS: Yeah. Well, you know, I mean he didn't come over right away.

Like I already said, I mean I've got a conscience, and I don't want to—

Q BY MR. IDEMAN: I can't hear you, Melvin. Speak up.

A I said that when we were out in the hall earlier, that I'm not that absolutely sure he did come over, because I was on acid at that time.

THE COURT: Acid means what?

THE WITNESS: LSD.

THE COURT: LSD?

THE WITNESS: Uh-huh.

Q BY MR. IDEMAN: Did the defendant bring you something to your house?

A I can't recall. I mean, I think, but I'm [16] not positive. You know, I can't remember that much about the day.

Q Well, what do you think it was that he brought you?

MR. COONEY: Objection, your Honor. It calls for conjecture, "what he thought."

THE COURT: Sustained.

Q BY MR. IDEMAN: Melvin, what is your best recollection of what he brought?

MR. COONEY: Objection, your Honor, again. Assumes a fact not in evidence, that he did bring something.

THE COURT: Sustained; no foundation.

Q BY MR. IDEMAN: Did he bring something to you to your house?

A Not that I recall, he didn't.

Q At the preliminary hearing didn't you testify that the defendant asked you to sell marijuana for him?

A I—to what I recall, I said the same thing.

He called me up and asked me if I would sell some stuff for him.

Q Is it your testimony that you did not say marijuana, or say stuff?

MR. COONEY: Objection, your Honor. At this time counsel is going to impeach his own witness. [17]

MR. IDEMAN: Yes, I am; and I am entitled to under Sections 1235 and 770 of the Evidence Code.

MR. COONEY: I know he has a right, but—

THE COURT: That is not the point. I think the objection is the form of the impeachment.

I think the only thing we have to have is to read the questions and answer that he gave at the previous hearing and ask him if he so testified.

MR. IDEMAN: It is not necessary to do it in that manner any more; however, I will if you wish.

THE COURT: All right, you educate me. What is the difference in the law from that which I learned 40 years ago?

MR. IDEMAN: It changed last January 1st, your Honor. I will show it to you.

May I show the Court?

THE COURT: All right.

(Court perusing a book.)

THE COURT: I don't see that that has changed the rule at all.

I am saying that you don't have to show the transcript of the preliminary hearing to this witness. All you need to do of this witness is not to paraphrase what he said, but ask, "Were you asked the following questions, and did you make the following answers?"

MR. IDEMAN: Very Well. [18]

Q BY MR. IDEMAN: Melvin, you remember testifying at the preliminary hearing, don't you?

A Yeah.

Q These questions were asked of you. I will ask you whether these questions were asked of you.

MR. COONEY: Counsel, what page?

MR. IDEMAN: Page 5, line 10. These are questions by the District Attorney at the preliminary hearing.

"Q Now, do you recall exactly what date this was?

"A Around the 5th or the 6th.

"Q Where did this take place?

"A At my house.

"Q Was there a conversation that led up to this purchase of some item?

"A He wanted to know if—

"Q As best as you can recall at this time without relating that conversation.

"A Just that he had a kilo of marijuana and
—"

And there was some colloquy between counsel and the Court, and the Court asked you—no, this is something the District Attorney said.

"Q I assume you are telling us the substance of the conversation, correct? [19]

More or less what he said and more or less what you said?

"A Yes, more or less.

"THE COURT: We don't have to have the exact words, but use them as much as you can.

"THE WITNESS: Yes.

"THE COURT: All right, now.

"Q BY THE DISTRICT ATTORNEY: Did he at any time say what it was he was selling?

"A Yes, sir.

"Q What did he say?

"A Marijuana.

"THE COURT: How much?

"THE WITNESS: A kilo.

"THE COURT: A kilo?

"THE WITNESS: Yes.

"Q BY D.A. Would you describe how large an item that was?

"A It came in 29 Baggies and in a large shopping bag.

"Q Did you pay him money for this?

"A No."

Q BY MR. IDEMAN: Now, do you remember so testifying?

A Well, not—like I said, I can't remember that much, but— [20]

Q Well, I am asking you now whether you remember being asked these questions and giving these answers at the time of the preliminary hearing?

A Somewhat, yes.

THE COURT: What was the answer?

Read it back, Miss Reporter.
(Answer read by the reporter.)

Q BY MR. IDEMAN: Now, Melvin, is there anything in there, what I have read to you, that is not true, that you did not say at the time of the preliminary hearing?

A Well, like I say, I can't remember what I said at the preliminary hearing.

Q Is it a fact that at the time of the preliminary hearing you were telling the truth as you believed it to be at that time?

A Yes, I believed it to be at that time, yes.

Q I see; and the present testimony is that you don't remember whether the defendant brought you anything?

A After the phone call that—I can't absolutely say that he came over and brought me anything, no.

Q Well, did you—did he give you—whether he came over and gave you anything or not, did he give [21] you a shopping bag?

A No, he didn't have no shopping bag.

Q Did he give you 29 Baggies?

A Not, well, like I was saying—I mean I was on acid, you know, and eventually it gets hard on everything, but that night I was down on—yes, I guess I did have 29 Baggies of marijuana.

Q The night that you talked to the defendant?

A The night after, yes.

Q The night after you talked to him?

A Or the same night.

Q The same night?

A Yeah.

Q Where did you get the 29 Baggies?

A I got them at—I can't—

THE COURT: Are you on acid now, Mr. Porter?

THE WITNESS: No, I'm not.

THE COURT: Are you under any narcotic sedation?

THE WITNESS: No.

THE COURT: Do you understand the questions that counsel is asking?

THE WITNESS: Yeah.

THE COURT: Proceed.

Q BY MR. IDEMAN: Answer my question, Melvin. Where did you get the Baggies?

A I can't—I mean, you know, I can't recall [22] that, you know, how I actually did get them, but I know I got them.

Q The defendant brought them to your house, didn't he?

MR. COONEY: Objection, your Honor; this is leading.

THE WITNESS: No, he didn't.

MR. COONEY: This is leading, your Honor.

The testimony of the preliminary hearing transcript is not to that effect, and so counsel cannot even ask him that for the purpose of impeaching his former testimony.

THE COURT: Your objection will be sustained.

MR. IDEMAN: Whether it is contained in the preliminary hearing transcript or not is of no moment, your Honor, when the witness obviously is turning hostile as he is. I am entitled to take him as a hostile witness and ask him leading questions. I believe that is the state of the law.

MR. COONEY: It could be, but I think good faith must be shown in asking those hostile questions, especially in the context of the previous impeaching—

THE COURT: I think that the record has indicated—I mean the witness' actions so far have indicated a certain hostility by lack of knowledge.

I am just wondering with the state of the [23] admissions this young man has already made, how he is not a co-defendant in this matter, and here testifying as—I mean this is a highly unsatisfactory performance on the part of this young man, as far as I am concerned, in answering questions that are asked of him; but furthermore, as to what he has testified to, as to whether anyone has advised him that he may be incriminating himself in making the answers that he made to you.

MR. IDEMAN: I understand that his case has been handled by the Juvenile Court and concluded now.

That is my understanding; so I don't think this would be an open point.

THE COURT: What is the state of his—

MR. IDEMAN: I understand from the investigating officer that a Petition was filed in the Juvenile Court alleging him to be a delinquent juvenile for furnishing narcotics.

That hearing was held, and the Petition was sustained, and the defendant was granted probation, and I understand he is presently on probation and released from that offense.

THE COURT: Do you know the terms of his probation?

MR. IDEMAN: I do not, your Honor. He hasn't claimed any—

THE COURT: Well, let's proceed a little further, [24] but, as I say, I am not particularly satisfied with the course of the witness' behavior here, and I would like to have further efforts made before we start leading him.

Go ahead, counsel.

MR. IDEMAN: Would you repeat that, please your Honor.

THE COURT: I said that I would like to have some further questions asked of him in a normal fashion before we either lead him or impeach him, and I want to see just how delinquent he is in his answers, and whether or not there may be some other course we might have to take with his attitude.

MR. IDEMAN: Yes, your Honor.

Q BY MR. IDEMAN: Now, Melvin, at any rate, you came into possession of 29 Baggies; is that right?

A Yes.

THE COURT: What did you say?

THE WITNESS: Twenty-nine.

Q BY MR. IDEMAN: What did these Baggies have in them?

A Marijuana.

Q Did you recognize those as being marijuana?

A Yeah.

Q From your previous experience with it?

A Uh-huh.

Q Did you smoke some of this marijuana? [25]

A Yeah, I did.

Q Did you make it into cigarettes?

A Uh-huh.

Q Describe how you do that, Melvin.

A What? I didn't understand you.

Q Describe how you make cigarettes out of the marijuana.

A I just took and cleaned it with a—what do you call that?

Q A strainer?

A Oh, yeah, and got some rolling papers and put some in there and rolled it up like a cigarette.

Q When you smoked the cigarettes, how did they make you feel?

MR. COONEY: I object to this.

THE COURT: Counsel, just a minute, please.

(Proceedings had on unrelated matters.)

THE COURT: Thank you. Go ahead, please.

MR. COONEY: Well, I will withdraw my objection.

Q BY MR. IDEMAN: Melvin, the question was, how did smoking the substance make you feel? Describe how you felt.

A You mean physically or—

Q Physically and mentally.

A Physically I felt kind of tired. Mentally, well, you know,—I don't know. I just usually listen [26] to the record player, and, you know, the sounds are more—I don't know how you actually describe it, but let's see.

Well, it makes you feel kind of superior in a way.

Q Did you feel kind of high?

A Oh, yes, if that is what you mean.

Q Did you feel about the way you did when you smoked pot on other occasions?

A Oh, yes.

Q Did you sell any of these Baggies of marijuana?

A Yeah, I sold a few of them.

Q Did something happen to the rest of them?

A Yes, sir, they were stolen.

Q From where?

A From my closet.

Q About how long was that after you got the full amount of the 29 Baggies?

A Well, it was before the policeman that came out that I sold the stuff to.

It's a Negro buyer. You see, he came before the 10th. It was before the 10th.

Q So you only had them a few days?

A Yeah.

Q So you sold a few, and you smoked a little, and much of it was stolen? Is that what you are saying?

[27]

A Yes.

Q Among the Baggies that you sold, you sold one to an officer, Officer Dominguez; is that correct?

A Yeah, Officer Dominguez.

Q You didn't know he was an officer at that time?

A Not that day, no.

Q But you later learned that the day when he arrested you?

A Well, I knew before that, I knew the following day.

Q But you didn't know that at the time that you sold it to him?

A No, no.

Q Now, do you remember clearly that the rest of the marijuana was stolen from your house?

A Yes, it was stolen.

Q You have a clear recollection of that?

A Yes.

Q You have a clear recollection of selling to Officer Dominguez?

A Yeah.

Q And you have a clear recollection of talking to the defendant on the telephone before you got the Baggies, right?

A Yes. [28]

Q But you do not have a clear recollection of how you came into possession of the 29 Baggies?

A No, you see, I got up in the morning, and I took the acid. Then he called about 20 minutes later, and about—

Q You say "he called." Whom do you mean?

A John.

Q The defendant, Mr. Green?

A Yeah, he called about 20 or 30 minutes later, and then about half an hour or 45 minutes after that. I was under the influence of it, and that's all.

Q Now, did somebody—these 29 Baggies containing marijuana, did they come all in a shopping bag?

A Yes.

Q Did somebody tell you where you would find the shopping bag?

A I suppose someone did tell me.

Q Do you remember who that was?

A No, I can't say absolutely.

Q Do you know where Mr. Green's father's house is?

A Yes.

THE COURT: What was the question?

Q BY MR. IDEMAN: Do you know where Mr. Green's parents live?

A Yes. [29]

Q Where was that back in January?

A At the corner of Bassett and Gazette.

Q Did you get the shopping bag there?

A I might have. You know, I knew John called, and I mean—

MR. COONEY: I move to strike the answer, "I might have," as a speculation, your Honor.

MR. IDEMAN: Well, that is—

THE COURT: That is the best of his recollection at this time.

MR. COONEY: Well, he might have, and he might not have. It assumes a fact not in evidence.

THE COURT: Well, that is for you to cross examine the witness on, counsel.

I am aggravated at his reluctance to act as a normal witness to respond to questions that have been asked of him.

For your information, counsel, "he might have," doesn't mean very much to me, but I think it is his best recollection at this time.

Q BY MR. IDEMAN: Now, Melvin, after you talked to the defendant when he asked you to sell some stuff for him, did you see him in person? When is the next time you saw him in person after that?

A I think I might have seen him that day, but I couldn't be positive. It was the day before or the [30] day after.

Q I am going to read to you, Melvin, some testimony from the preliminary hearing. I want you to listen to it to see whether or not it is the testimony that you gave at the preliminary hearing. Do you understand?

A Uh-huh.

MR. IDEMAN: Page 12, counsel, at line 5.

This is cross examination at the time of the preliminary hearing by Mr. Cooney.

Listen now, Melvin.

"Q You say that Mr. Green came over and talked to you on the 5th or the 6th of January?

"A Somewhere around there, yes, sir.

"Q This was at your home?

"A Yes, sir.

"Q Was anybody else home at that time?

"A No, sir.

"Q Now, prior to the 5th or the 6th of January, did you have any marijuana on your premises?

"A What do you mean, sir?

"Q Did you have any at home?

"A When he came over?

"Q Before he came over. [31]

"A Yes, I had some.

"Q You had some already; is that correct?

"A Not until the time when I received his, no, but I had some others, yes.

"Q You had no marijuana in your house, to your knowledge, until Mr. Green came over; is that correct?

"A Oh, yes, I had some there.

"Q Mr. Green came over, and what did he say to you? Try to use the exact words that he said, if you can.

"A Just that he wanted me to sell or, you know, to sell the stuff that he had given me, and to give him the money when I got it.

"Q He said, 'I've got some stuff here. I would like for you to sell it.' Is that correct?

"A He said marijuana.

"Q He used the word marijuana; is that correct?

"A Or grass, yes.

"Q What did he use? Grass?

"A Mostly grass or marijuana, yes.

"Q Are you giving me a choice?"

Then there was an admonition by the Court.

"THE WITNESS: Well, I'd say marijuana. [32]

"Q BY MR. COONEY: You actually recall him saying marijuana, or are you just guessing that he might have said that?

"A I'm pretty sure that is what he said.

"Q Did he have a shopping bag with him at the time?

"A No, he didn't.

"Q Actually where did you get the shopping bag?

"A Over at his father's house, his parents' house.

"Q But he didn't hand it to you, did he?

"A No, he showed me where it was, and I went and got it."

Q BY MR. IDEMAN: Now, Melvin, up to this point the questions and answers that I read to you, are those the questions that were asked of you at the preliminary hearing and were those the answers that you gave?

A Well, as well as I can remember, yes.

THE COURT: Read back the answer, please.

(Answer read by the reporter.)

Q BY MR. IDEMAN: You were telling the truth at the time that you were testifying then; is that right?

A Yes.

MR. IDEMAN: Counsel, continuing on on page 14.

"Q Now, this is on the 5th or the 6th that you had a conversation with him at your house; is that correct?

"A Yes. It was at my house.

"Q After this conversation took place a day or two later you went over and picked this stuff up?

"A I think this was that night, yes, sir.

"Q Was it that night or the following night?

"A I think it was that night.

"Q Now, when you picked up this stuff from his father's house, was Mr. Green home?

"A I wouldn't know, sir.

"Q Where did you pick it up?

"A From his back yard, sir.

"Q Nobody was there when you picked this stuff up; is that correct?

"A I wouldn't know. He just told me to go in the back yard."

MR. COONEY: I object to this, your Honor. An objection was made to this at the time of the preliminary hearing, and it was stricken.

MR. IDEMAN: Yes, that was stricken; I'm sorry. Where it says, "I wouldn't know," that is [34] out.

THE COURT: All right.

MR. IDEMAN: Now, these are further questions by Mr. Cooney.

"Q Nobody—"

THE COURT: Excuse me. What was— Miss Reporter, read me back the one that was stricken.

(The record was read by the reporter.)

MR. IDEMAN: Yes, the one that was stricken was, nobody was there when he picked this stuff up. Then there was an answer, and the answer was stricken.

Now, these are questions continued by Mr. Cooney at line 21, page 14.

“Q Nobody was present in the back yard when you picked it up, the shopping bag; is that correct?

“A No, sir.

“Q Nobody was home; is that right?

“A I don't know if anybody was home. Nobody was in the back yard.

“Q Nobody was in the back?

“A No.

“Q Where was the shopping bag?

“A It was behind the garage, behind the bush.

“Q It was behind the bush? [35]

“A Yes.”

Q BY MR. IDEMAN: Now, were those questions asked of you, and did you give those answers at the preliminary hearing?

A Yes, I guess so, yes. I'm pretty sure.

Q Does that refresh your recollection as to where you got that shopping bag full of marijuana?

A Well, I mean—like I already said, I can't be that sure. I mean—

Q Melvin, my question is, my reading the questions and answers to you, does that refresh your recollection? Does that make you remember where you got that shopping bag of marijuana?

MR. COONEY: Objected to on the grounds that it has been asked and answered, your Honor.

THE COURT: Go ahead. Overruled.

THE WITNESS: I guess so, yes.

Q BY MR. IDEMAN: I beg your pardon?

A I guess so, yes.

Q All right. Now, with your recollection refreshed, would you tell us of your own knowledge, where did you get that bag of marijuana?

A Well, I guess I got it from his back yard.

Q Whose back yard?

A John's.

Q Do you mean the defendant's? [36]

A Yes, I guess so.

Q Did he point it out where it was?

A I guess so.

Q Did you get any money for selling this marijuana? The bags that you had managed to sell?

A Yes.

Q What did you do with the money?

A I gave it to John, I think.

Q To the defendant?

A Yes, I guess.

MR. IDEMAN: Cross examine.

CROSS EXAMINATION

BY MR. COONEY:

Q Now, Mr. Porter, you have testified that on the day that Mr. Green phoned you, you had taken some LSD; is that correct?

A Yes.

Q And before that time you had also taken LSD's in the past; is that correct?

A A few times, yes.

Q Now, tell us what reaction this LSD produced in you.

A Well, it is hallucitory—I mean it makes you hallucinate things.

Q It makes you think things are happening [37] that really aren't happening?

A Yes.

Q And is this the reason why you have been uncertain as to what happened after Mr. Green phoned you on the telephone?

A I just can't absolutely—I don't remember. I mean, you know, I can't absolutely say if he did, or, you know, come over or not. I am not that positive.

Q In other words it is difficult for you at this time to distinguish between what your hallucinations were and what actually took place; is that correct?

A Yes, I guess so.

Q Now, after you have taken a dose of this LSD, does the hallucination it creates recur at a later time?

A What do you mean?

Q Well, after the effects wear off—say, you take it on a Sunday, and it lasts for a few hours; is that correct?

A About 12—about 12 to 14 hours.

Q And after that wears off, do you have these hallucinations at a later time without taking another dose?

A Yes, sometimes, yes.

Q Now, the Deputy District Attorney has read to you certain testimony and has asked you some questions [38] concerning that.

Now, did that refresh your recollection as to what you testified to at the time of the preliminary hearing?

A Yes.

Q Now, did it refresh your recollection as to what actually happened that first week in January?

A Well, I could remember more then; but if that is what I said, that is probably what happened, yes.

Q Did it merely refresh your recollection as to your testimony at the time of the preliminary hearing, or did it refresh your recollection as to what actually happened?

A Mostly my testimony, I guess.

Q So you are still unsure as to actually what happened after Mr. Green had phoned you on the telephone, and after you had taken this dose of LSD; is that correct?

A Do you mean am I uncertain?

THE COURT: Read back the answer, please.

(Answer read by the reporter.)

Q BY MR. COONEY: Yes, that's the question.

A Yes, I'm not positive now.

Q Now, Mr. Green didn't tell you to take that dose of LSD, did he?

A No.

Q Now, prior to January of this year had [39] Mr. Green sold you an automobile?

A Yes, he had.

Q And this money that you gave, that you testified giving to Mr. Green, was this as partial payment for the purchase of this automobile?

A Yes, I paid him for the automobile.

THE COURT: Miss Reporter, read back the question and answer, please.

(Record read by the reporter.)

MR. COONEY: Nothing further at this time, your Honor.

MR. IDEMAN: I have no other questions at this time, your Honor.

I would ask the Court to instruct the witness to remain, however.

THE COURT: All right.

Let me ask you, Mr. Porter.

THE WITNESS: Yes.

THE COURT: Had you taken your LSD before Mr. Green called you on a particular day early in January, or did you take it after he called you?

THE WITNESS: No, just before, about 20 minutes before he called me.

THE COURT: It is your statement to the Court that you do not remember what he said to you because you had 20 minutes earlier taken a dose of LSD. Is that what [40] your statement is?

THE WITNESS: I said that—well, he asked me if I could sell some stuff for him. Yes, that's what I said.

THE COURT: You never discussed the word "marijuana" or used any other words except "stuff"; is that what your statement is?

THE WITNESS: Oh, he might have. I mean—I mean this is all about three months ago. I can't remember that far back.

THE COURT: Well, is it because of the use of the LSD at that time that your memory is bad today?

THE WITNESS: No, I have always had a not very good memory.

THE COURT: All right. Step down. You may remain outside.

MR. IDEMAN: People will call Officer Wade.

BARRY M. WADE,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Barry M. Wade; W-a-d-e. [41]

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer Wade, what is your occupation?

A I am a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Division.

Q Are you the investigating officer in this case?

A Yes.

Q In connection with your investigation of this case, did you have a conversation with a Melvin John Porter, the previous witness?

A Yes, I did.

Q When and where did that conversation take place?

A That was on January 31, 1967 at 4:00 P.M. at the Juvenile Division Headquarters.

Q Who was present at that time?

A Melvin Porter and myself.

Q What was his condition as far as sobriety or being under the influence of any drugs were concerned at that time?

A He was sober at the time.

Q And did you have a conversation with him pertaining to this case?

A Yes, I did.

Q Tell us what he told you. [42]

MR. COONEY: I object to this at this time, your Honor.

Counsel has impeached his own witness. Now he attempts to bring in an officer to show prior consistent

statements for the purpose of rehabilitating the witness, that is already impeached.

MR. IDEMAN: Oh, no, no. This statement comes in not for the purpose of rehabilitating the witness. It comes in as an affirmative evidence in the case—I might invite the Court's attention to Sections 1235 and 770 of the Evidence Code—without foundation and not limited to impeachment. It comes in as evidence in the case.

THE COURT: Is this going to be in the form of an admission or confession?

MR. IDEMAN: Not the statement of the defendant, your Honor. This would be the statement of the previous witness.

THE COURT: Yes, but I mean—you see, to me it is hard to understand how, from the position of the—the state of the record, this previous witness is not also a co-defendant here. I presume that is because he is a juvenile; that he has been made a ward of the Juvenile Court; and once having been made a ward of the Juvenile Court, what status does that place his posture in this situation?

MR. IDEMAN: Well, I don't believe I follow you, [43] your Honor.

THE COURT: Well—

MR. IDEMAN: Could he be prosecuted for some offense now? Is that what your Honor is asking?

THE COURT: The fact that he has been made a ward of the Juvenile Court, as I understand what the statement of the District Attorney was, that he has been found to be a delinquent and has apparently been given some type of a probation—

MR. IDEMAN: Yes.

THE COURT:—now is he a—

MR. IDEMAN: Is he a possible defendant in a criminal case? Is that what your Honor is asking?

THE COURT: Yes, what is his possible involvement in this matter now?

MR. IDEMAN: Practically or legally?

THE COURT: Practically and legally.

MR. IDEMAN: Practically, the case against him is over. That is all there is.

Legally, I am not familiar with Juvenile Court Laws.

At any time if he wanted to assert his right against self-incrimination, the District Attorney's Office would immediately prepare immunity papers and have them signed by him. It is a matter of 30 minutes to an hour to get the Presiding Judge in Department 100 to issue [44] the proper papers, and he is immunized, and he can never be prosecuted by anything arising out of his testimony, but he did not claim that privilege, probably realizing that nothing out of this could happen to him.

Of course, this officer's testimony here won't affect that at all, because this was given in a proceeding against that witness and not—

THE COURT: It does, though, to this extent: What was this witness trying to do? Exonerate himself from any implications or liability? In other words, what concerns me most is what is the probative value as to this 16 year old who comes in here and defies the Court and counsel with his non-responsive, insolent answers. Is this done because he fears he is in the shadow of a criminal charge, or because he is addicted on LSD or marijuana, or is he just a bad delinquent and—what I am concerned about is what led up to why he would make some statements or confessions or admissions, whatever it was to these officers.

MR. IDEMAN: I think that is a proper area for cross examination, and I think your Honor will and should consider this in deciding what weight should be given to the statement he made to the officer.

Now, to comment on the Evidence Code, Section 1235, as your Honor is aware, changed the law, and now his statement comes in as evidence in the case, and [45] the comments of the drafters of Section 1235 are interesting. Let me read to your Honor—

THE COURT: All right.

MR. IDEMAN:—because I think it will cast some light on it.

THE COURT: There is another thing. Once being found a delinquent is the same as being found—the same as a felon. In other words, here is a charge that he has been held up on, which if tried as an adult, would make him a felon. Is he testifying under the cloud of a—as a felon?

I mean, to me these things are puzzling me as to what the status of this young fellow is now as he testifies.

MR. IDEMAN: Well, he doesn't have a felony conviction. No proceedings by the Juvenile Court can result in a felony conviction even if he is committed to the Youth Authority.

His exact status, I am not sure. He is a ward of the Court. He is on probation to the Juvenile Court.

I don't think it was brought up on cross examination. He is still here.

THE COURT: Well, I am talking out loud to both of you.

What concerns me about this apparently [46] worthless type of youth—

MR. IDEMAN: Well, I will say this to the Court.

I didn't make an opening statement in this case, but I think the evidence will show that this young man sold marijuana to an undercover officer. That would be proven, which will show that he as a man—a boy of 16—got marijuana somewhere. Somebody gave him marijuana. Now, the question is going to be who did it.

THE COURT: What is your objection, counsel, to this witness' testimony?

MR. COONEY: Well, your Honor, I am not familiar with the Evidence Code as opposing counsel is, but to me this would sound like the rankest form of hearsay.

At the expense of sounding somewhat poetic, I will say this:

THE COURT: Well, let me ask this, counsel, to make an offer of proof as to what this officer will testify to.

This was done to the officer to whom he sold the marijuana?

MR. IDEMAN: No, no, your Honor.

THE COURT: This is just to the investigating officer?

MR. IDEMAN: The Juvenile Narcotic Investigating Officer, yes. [47]

The offer of proof, your Honor, I would have to read from the police report as follows:

The officer will testify that the witness, Melvin John Porter, told him at the time and place referred to that between January 1, 1967, and January 10, 1967, he, the defendant, called Melvin at Melvin's home, and he told him that he was obtaining a kilo of marijuana and wanted to know if he could leave it at his, Melvin's, house.

The defendant came over to the house between 2:30 to 5:30 P.M. with a shopping bag containing 29 Baggies, approximately one kilo, containing a brown leafy material known to Melvin as marijuana.

The defendant gave Melvin the entire contents to keep in Melvin's bedroom closet.

The defendant told Melvin he could have one bag for himself and retain the remainder for the suspect, for the defendant, who would pick it up at a later date.

Melvin told the officer he made four or five cigarettes from the material and smoked them.

When he smoked them his throat got dry, and his eyes got red, and he got high and intoxicated after smoking the cigarettes.

On the 10th of January, 1967, at 12:45 P.M. Melvin sold a portion of this material that came from the [48] defendant to the undercover police officer, Officer Dominguez.

That the victim further went on—during the last five months the defendant has brought large quantities of marijuana to Melvin's home and has given it to him to hold.

On numerous occasions Melvin has taken some for himself and has paid the defendant for it.

That the—Melvin was—that the defendant would leave marijuana and LSD with Melvin; that the defendant would tell Melvin who was going to come and pick it up, and the purchasers would come to Melvin's house and pay him for the marijuana and LSD, and that Melvin would give the money to the defendant at a later date; and that during the five months preceding the conversation the defendant delivered large quantities of marijuana to Melvin approximately once a week.

Now, that is highly material. Whether your Honor believes it or not, of course, that is up to the Court.

THE COURT: I was going to say, that is the problem.

MR. IDEMAN: It goes to the weight, but let me just read to your Honor the comments which I think is important.

"Section 1235 permits an inconsistent [49] statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770, and it is because it pertains to a witness who has not been excused, which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement.

"Because 'Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony, and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant and hence inadmissible.

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross examined in regard to his statements and their subject matters.

"In many cases the inconsistent statement [50] is more likely to be true than the testimony of the

witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversies that gave rise to the litigation.

"The trier of the fact has declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.

"Moreover Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

Now, your Honor, the evidence is clearly admissible. Clearly the intent being that the framers of this particular Section realize what we all know, particularly in a case like this, the young man is more likely to tell a true story shortly after his arrest and not months later after he has had a chance, perhaps, to be conditioned by various factors that may have happened [51] to him.

Whether or not—what weight your Honor wants to give to it, that is up to your Honor. You may give it great weight. You may give it no weight, but it is material to the case, terribly material.

THE COURT: What is your position, Mr. Cooney?

MR. COONEY: Well, your Honor, I think that counsel is trying to prepare a case entirely out of patches.

Now, he has read in his offer of proof—he has read a third version. Now, we have heard a third version of this story.

This does not rehabilitate his testimony at the preliminary hearing. This is the third version to impeach that version of the testimony of the preliminary hearing.

Now, we have three different stories, and counsel is attempting to introduce the third story further in asking your Honor, "Look, take your pick, whichever one you want. We have still got him."

THE COURT: Well, that is not what is disturbing me as much as it is the—if the offer of proof which he made is allowed to be introduced, it is on other material besides which is the question of inconsistent statement.

MR. COONEY: I know he went pretty far afield [52] in reading this statement from the police report.

THE COURT: In other words, I think the only thing that this officer can testify to is to anything to which this defendant has given an inconsistent statement.

MR. IDEMAN: Do you mean the witness?

THE COURT: No, I am now talking about Porter.

I don't think we have any right to go into all of the statements made that goes back five months to—say, we had a jury here and intimate by insinuations that a course of conduct has prevailed which would seduce us into believing that having done this all this time that certainly he must have done it on the occasion, the one time which he is charged with on the 10th day of January, 1967.

I think that the only thing that this witness can now tell us of the conversation he had on January 31st, is anything that related to the acquisition of the merchandise that is alleged to have been given to him by the

defendant on or before the 10th day of January, and not go back into anything that relates to some course of conduct over a five-months period.

MR. COONEY: That is true.

MR. IDEMAN: Well, I will direct my question to the officer only for that period then.

MR. COONEY: Wait a minute; one further thing, [53] your Honor. That is, this statement that he gave to the officer must tend to corroborate the prior testimony at the preliminary hearing. I mean, it is for the purpose of showing the prior consistent testimony—I mean, the prior consistent statement of the witness.

MR. IDEMAN: No, it is not.

MR. COONEY: Well, I don't really understand.

MR. IDEMAN: It is an inconsistent statement made by him at a time just after his arrest.

I think the evidence will bear this out, and your Honor is going to have to decide which, if any, of the versions of the witness' testimony are true.

It is very obvious to the Court that the statement to the officer is very detailed. At the preliminary hearing it is less so; and here at this trial it is even less so; and so I suspect in another month or two he won't even know his own name; or ever have seen the defendant before.

THE COURT: Actually, the inconsistency of this young man today as compared with the preliminary hearing testimony was his only recollection of the word "stuff," and that he doesn't recall how he came into the 29 Baggies of marijuana.

MR. IDEMAN: Yes, and that latter point is the crux of the case, is it not?

THE COURT: All right. So, those are the two [54] matters which I am going to rule that this officer

can testify to because of the inconsistencies on those two subjects.

MR. IDEMAN: All right. May I frame the question to the officer?

THE COURT: Yes.

Do you understand, Officer? I want you to limit yourself to just as though we had a jury over there.

THE WITNESS: Yes.

MR. IDEMAN: All right—

THE COURT: Just a minute, counsel, let's take care of the other counsel who have been here waiting for the jury verdict.

(Proceedings on unrelated matter.)

THE COURT: All right, go ahead and frame your question, counsel.

Q BY MR. IDEMAN: Officer Wade, tell us what the defendant (sic) told you about how he came into possession of the 29 Baggies of marijuana.

A Mr. Porter told me that the defendant, Mr. Green, called him up in the morning and stated that he had a kilo of marijuana, and he wanted to know if he could bring it over and leave it at Mr. Porter's house.

I asked Mr. Porter if he said marijuana, and he said he thought he used the word "stuff" or "grass." [55]

I then asked what he meant by "stuff" or "grass" and he said "marijuana."

I asked him what his reply was to Mr. Green, and he said that his reply was that he could bring it over to his house later on that day.

Mr. Porter told me that later on that afternoon Mr. Green came over to his house with a brown shopping bag, containing 29 wax bags containing a green leafy material, which Mr. Porter recognized as resembling marijuana.

MR. IDEMAN: Thank you, that's all.

Cross examine.

THE COURT: Did we get the foundation as to what date this was that he said it was?

MR. COONEY: I think it was January 31st.

THE COURT: I have the date, but what day was it that the proposed conversation between the defendant and Mr. Porter occurred?

Q BY MR. IDEMAN: When was that supposed to have occurred?

A This occurred sometime between January 1, 1967, and January 10th of 1967.

Q That was as close as he could pinpoint it down for you?

A Yes.

MR. IDEMAN: That's all. [56]

CROSS EXAMINATION

BY MR. COONEY:

Q Officer, you testified that the defendant—that Mr. Porter appeared to be sober to you at the time his statement was made; is that correct?

A Yes.

Q How much previous to the time the statement was made was he arrested?

A Approximately three or four days prior to that.

Q He had been arrested three or four days prior?

A Yes.

Q All right. Now, you have heard Mr. Porter testify earlier that he has taken LSD's and that many times these—he stays high or has the hallucinations for a period of from 12 to 14 hours, and then even at a later time, days later, these hallucinations can recur without

him taking any additional LSD's. Did you hear him testify to that?

A Yes.

Q Do you know whether or not Mr. Porter was having any hallucinations induced by LSD at the time the statement was made by him?

A In my opinion he was not under the influence of LSD at this time. [57]

Q How do you tell if someone is under the influence of LSD? The pupils don't dilate, do they?

A No, sir.

Q Actually, a person has no outward appearance of being under the influence of something do they?

A He does have an outward appearance if he is under the influence of LSD in many cases.

Q Have you observed Mr. Porter while he was under the influence of LSD?

A No, I haven't observed Mr. Porter while he was under the influence.

Q It is true—have you observed any people under the influence of LSD?

A Yes.

Q How many people have you observed under the influence of LSD?

A Approximately five.

Q Isn't it true that each person will react somewhat differently to the administration of a dose of LSD?

A Yes, sir, that is true.

Q Some will get sleepy, and some will get extremely high; is that correct?

A Yes.

Q And others will range from between those [58] extremes; is that correct?

A Yes, sir.

Q Mr. Porter was not sleepy at the time he made this statement, was he?

A No.

Q He was not extremely high?

A No, sir.

Q He was somewhat between those two attitudes; is that correct?

A He was, sir, but I would like to explain my answer.

THE COURT: All right. He was between what?

THE WITNESS: He was between the symptom of being sleepy and between the symptom of being high. However, he was not within the—he was not acting in a manner in which I had observed other people act while under the influence of any narcotics or drugs in that he was not acting in a, shall we say, far out manner. He was acting normal like you and I.

Q BY MR. COONEY: You were present at the time of the preliminary hearing, were you not?

A Yes, I was.

Q And at that time you heard Mr. Porter testify that he went over into the back yard of Mr. Green's parents' home and got this marijuana?

A Yes, [59]

Q And at that time you knew that this was inconsistent with the previous statement that he made to you on January 31st; isn't that correct?

A Yes, sir.

Q Did you talk to Mr. Porter about this after the preliminary hearing?

A No, sir.

Q And it is your testimony that on January 31st, 1967; Mr. Porter's conduct and appearance did not

resemble these other five people that you observed as being under the influence of LSD; is that correct?

A Yes.

Q Now, at the time that statement was made by Mr. Porter to you, had you advised him of his Constitutional rights?

A Yes, I had.

Q He was—was he in custody at the time?

A Yes, sir.

Q Had charges or a Petition been filed against him?

A I had filed a request for a Petition with the Juvenile Court prior to talking to him.

Q And this was a conversation which was solicited by you?

A No, sir.

Q I mean; did you go to see Mr. Porter for [60] this conversation?

A I received a request from his mother to go talk to him.

His mother told me that—

Q Well, now, wait—we're not concerned with what his mother said, but you went pursuant to a request by his mother; is that correct?

A Yes.

REDIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer, how long had he been in custody when you interviewed him?

A I believe three or four days. He was arrested on the week end.

Q Three or four days?

A Yes, sir.

Q How long does it take for the effects of LSD to wear off normally?

MR. COONEY: Well, I object—

THE COURT: Well, I think we have an expert that has already testified.

He says 12 hours. I don't think this man has seen but about five people—in other words, he has only seen five people. How can he testify as an expert?

MR. IDEMAN: Counsel has treated him as one; [61] so I am entitled to—

THE COURT: Sure, but we have an expert who just testified, that 16-year-old youth in here that says it lasts 12 hours.

That is the nearest thing to an expert testimony, I think, that we have heard so far.

MR. IDEMAN: Very well, that is all.

THE COURT: Step down, Officer.

MR. IDEMAN: Officer Dominguez, please.

THE BAILIFF: Your Honor, Officer Dominguez had to go to move his car. He will be back in a moment.

THE COURT: Well, this is a good point to take our afternoon recess, at this point.

(Recess.)

THE COURT: All right, is our next witness available?

MR. IDEMAN: Yes, sir, Officer Dominguez, please.

RAMON DOMINGUEZ,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please and state your name.

THE WITNESS: Ramon Dominguez; D-o-m-i-n-g-u-e-z.

THE CLERK: Will you please spell your first name? [62]

THE WITNESS: R-a-m-o-n.

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer, what is your occupation?

A I am a police officer for the City of Los Angeles, assigned to Central Patrol.

Q Central Patrol?

A Yes, sir.

Q In January of this year were you a Los Angeles police officer then?

A Yes.

Q Were you assigned to Central Patrol then?

A No, I was assigned to Central Narcotics.

Q Were you working as an undercover officer at that time?

A I was.

Q As an undercover officer, were you attempting to purchase narcotics from narcotic sellers?

A That's correct.

Q In January, 1967, did you purchase some marijuana from a Melvin John Porter, the previous witness?

A I did.

Q When was that?

A I don't recall the exact date. It was in January in which I made a purchase of narcotics from [62A] Melvin Porter.

Q In connection with your—

THE COURT: What date was the purchase?

MR. IDEMAN: He didn't say, your Honor.

MR. COONEY: He doesn't remember.

THE WITNESS: I don't remember.

THE COURT: Do we have the record?

MR. IDEMAN: Yes.

Q BY MR. IDEMAN: Did you make a police report pertaining to Mr. Porter?

A Yes, I did.

Q When you made that report, at the time the events were fresh in your mind; is that correct?

A That's correct.

Q Does that report contain the date upon which you made the purchase?

A Yes, sir.

Q If you could look at your report, would that refresh your recollection?

A Yes, sir, it would.

MR. IDEMAN: Have you seen this, counsel?

MR. COONEY: No, I haven't.

(Mr. Cooney looking at a document.)

Q BY MR. IDEMAN: Officer, I show you this arrest report. Is this the arrest report that you participated in making on Melvin John Porter? [63]

A Yes.

Q Is that the report?

A Yes, sir, it is.

Q All right. Can you tell, after refreshing your recollection by looking at that report, can you tell us the date on which you bought some marijuana from him?

A It was January 10, 1967.

Q At what time and at what place did you make the purchase?

A At 12:45 P.M. at 20809 Bassett Street, Van Nuys.

Q Is that his residence?

A Yes, sir.

Q You were dressed in an undercover type of garment; is that right?

A Civilians.

THE COURT: Whose residence?

MR. IDEMAN: Mr. Porter's residence?

THE WITNESS: Yes.

THE COURT: Is that the Porter residence?

MR. IDEMAN: Right.

Q BY MR. IDEMAN: You were not wearing a uniform at that time?

A No, I was not.

Q You had not identified yourself as a police officer up to that time, had you? [64]

A Certainly not.

MR. IDEMAN: Your Honor, I have an analyzed envelope of the Los Angeles Police Department. It bears a DR number of 67-402-266.

I ask that the envelope and its contents be marked as People's 1 for identification.

THE COURT: Have you reviewed it, or do you have any objection as to what it is?

MR. COONEY: No, I will stipulate to its going into evidence at this time.

MR. IDEMAN: All right, fine.

THE COURT: What is the analysis? Can you agree upon it?

MR. COONEY: We have stipulated that—

MR. IDEMAN: We are going to—I was about to offer that stipulation, your Honor.

THE COURT: All right.

MR. IDEMAN: People offer to stipulate that W. G. Penprase be deemed called as a witness by the People, duly sworn and qualified as an expert forensic chemist; that he testified that he is employed by the Los Angeles Police Department;

That in this capacity that on January 11, 1967, he received from the Property Division of the Los Angeles Police Department this package now marked People's 1 for identification; [65]

That it was sealed with a red sealing wax at the time he received it.

He opened up the envelope by breaking the seal, by cutting around the seals, examined the contents and found the following: Two rubber bands and a plastic bag which he marked "P", which contained 20 grams of marijuana, made a chemical and physical examination and formed the opinion that the substance was in fact marijuana;

That he prepared this report, replaced the bag into People's 1 for identification and returned People's 1 for identification to the Property Division of the Los Angeles Police Department on January 11, 1967.

THE COURT: All right. Stipulated?

MR. COONEY: Stipulated, your Honor.

MR. IDEMAN: Can we also stipulate that—

Q BY MR. IDEMAN: Officer Dominguez, did you bring this bag to court at the preliminary hearing?

A It appears. If I may check it.

(Witness examining the article.)

Yes, this is the one. It has my name and my serial number on it.

MR. IDEMAN: May it be stipulated that Officer Dominguez checked this out, People's 1, out from the

Central Patrol Division on February 8, 1967, took it to Division 68 of the Los Angeles Municipal Court where it was [66] received into evidence, and it has been in custody of the Superior Court Clerk up-to this date.

MR. COONEY: So stipulated.

Q BY MR. IDEMAN: Officer, will you open this People's 1 for identification?

A Yes.

THE COURT: People's 1 in evidence by stipulation, isn't it?

MR. COONEY: Yes.

MR. IDEMAN: It is in? All right.

MR. COONEY: Yes.

MR. IDEMAN: All right, fine.

THE WITNESS: Inside the envelope I find a plastic bag.

Q BY MR. IDEMAN: All right.

A And my initials are on it, as well as the initial "P".

Q It contains a green leafy substance, does it?

A It does.

Q That is the plastic bag that Mr. Porter sold you on January 10th, is it?

A Yes, it is.

Q How much did you pay him for that?

A I paid him \$5.00.

Q Did he set the price, or did you? [67]

A He did.

Q Was that the last contact that you had with Mr. Porter on that day?

A Yes, it was that day.

Q When did you next talk to Mr. Porter?

A I believe it was the 18th or the 19th of January.

Q Where did you speak to him?

A I called him at his home, and I wanted to make arrangements for further purchases of narcotics.

Q From him?

A Yes, I wanted to purchase further narcotics from him.

At the time he indicated to me that he—

MR. COONEY: I object to what he indicated.

What he indicated, your Honor, this is obviously hearsay.

Q BY MR. IDEMAN: Tell us what he said, Officer.

THE COURT: Let me ask both of you this.

Is there any impediment; that is, in the testimony of this conversation with Mr. Porter, who is one of our complaining witnesses? Is there any impediment to this witness testifying to a conversation with Porter?

MR. COONEY: Pardon?

THE COURT: Is there any legal reason? [68]

MR. COONEY: Sure, it is hearsay. This man was not present. It is offered for the truth of the matter asserted, I assume.

MR. IDEMAN: Let me speak to counsel a moment, your Honor.

(Conference between counsel.)

Q BY MR. IDEMAN: Did you ever identify yourself as a police officer to Mr. Porter?

A I did not.

Q While you were working undercover, did Mr. Porter take you to meet anybody, or did you go together to meet someone?

A Yes, on the 20th. He did not take me, but—

Q Of January?

A That's correct.

Q 1967?

A That's correct.

Q Did you meet Porter somewhere?

A Yes, sir, I did.

Q Where did you meet him?

A I met him at Gus' Hot Dog Stand on Vanowen.

Q Was this by pre-arrangement or accidental?

A Yes, by pre-arrangement.

Q Was there somebody else there at that time?

A Yes, the defendant, Mr. Green. [69]

Q Did you talk to defendant Green?

A I did.

Q You were still acting as an undercover officer?

A That's correct.

Q Did you talk about narcotics?

A Yes, sir, we did.

Q What was the conversation as it pertained to narcotics?

A Earlier that day on the 20th, I had a conversation over the telephone with defendant Green.

Q How did you know it was Mr. Green that you talked to on the telephone? Did you recognize his voice somehow?

A I did. He stated he was John, merely John, and that—

THE COURT: Merely John?

THE WITNESS: He merely stated that his name was John, and I said, "John who?" and he said, "Well, I'm the man that has the stuff, and you're the man that wants to buy it," and I said, "Yes," therefore we had arranged to meet each other at Gus' Hot Dog Stand on Vanowen at 9:30 P.M. on the 20th. And I did go to this location on that date at 9:30, and I did meet John Green at that time.

Q BY MR. IDEMAN: Wait a minute; where were [70] you when you had this telephone conversation with the defendant?

A I was at the Van Nuys Police Department.

Q So, was it you that placed the call?

A Yes.

Q What number did you call?

A I had called Melvin Porter.

I wished to purchase narcotics, I told him, and he, Melvin Porter, told me that he would get hold of John.

Q But then you got a telephone call from someone.

A Yes, I received a telephone call from John Green.

Q A telephone call?

A I did.

Q At the police station?

A I did.

Q How did you identify yourself to John, by the way, on the phone?

A As Ray.

Q All right, go on with the telephone conversation.

A Well, on this telephone conversation between myself and John Green, we had made arrangements that on the 20th day of January, to meet at Gus', and I [71] asked him the prices of kilo of marijuana, as well as LSD, and he said that he didn't wish to discuss it over the phone; that he wanted to see me and talk it over; and that he would meet me at Gus'.

Q I take it that this telephone line that you received the call on doesn't go through the switchboard?

A That's correct.

Q It's a direct line, I assume?

A That's correct.

Q Go on; so what did you do then?

A Well, I did meet the defendant at Gus' at 9:30 on the 20th day of January.

Q Just the two of you?

A Yes, Melvin Porter was there. He was employed as a clean-up man there at this hot dog stand.

I waited for the defendant at this hot dog stand, and he did show up, and I asked, "Are you John?" and he stated he was.

I said, "Let's go outside and talk."

We went outside of the hot dog stand. I then inquired as to how much a kilo of marijuana—he would sell it to me for.

THE COURT: This is the defendant that you are talking to?

THE WITNESS: That's correct. [72]

Q BY MR. IDEMAN: What did he say?

A He said for \$500 he would give me five kilos of marijuana and eight caps of LSD.

During this conversation he handed me a—

MR. COONEY: Your Honor, at this time I object to this testimony as the conversation has nothing to do—it is an attempt to show a subsequent employer had act on the part of the defendant. It has nothing to do with the charge before the Court that he gave or sold or transferred to Melvin Porter some marijuana between the 1st and the 10th of January. It has nothing to do with any offense which occurred on the 20th day of January, or if an offense did occur that day.

MR. IDEMAN: Clearly, your Honor, it bears on the essential issue of this case, which is identity, your Honor.

Somebody gave Melvin Porter a bag of marijuana, which he sold to the officer, and the testimony of the

officer now shows who the dealer was, and the evidence of other acts, whether prior or subsequent to the one charged, are admissible if they tend to prove any matters in issue, and this tends to prove identity, who the dealer is that is supplying this marijuana.

MR. COONEY: It certainly does not identify Mr. Green as having been the person who gave or transferred that 29 Baggies of marijuana to Porter two or three weeks. [73] before.

THE COURT: I think the only purpose for which this can be considered is to show some relationship. In other words, as I understand this witness' testimony, he asked Melvin Porter to put him in touch with somebody. He wanted to get some more narcotics, and Melvin says, "Well, I'll put you in touch with somebody who can supply your needs."

I think it is for the limited purpose of showing that Porter and the defendant had previous associations and were acquainted. For that limited purpose it is admissible; not to prove a purchase or sale, if one in fact did occur on the 20th day of January.

MR. IDEMAN: Oh, no, that is not offered for that purpose.

THE COURT: For the limited purpose of showing associations.

Q BY MR. IDEMAN: All right. Would you go on with the conversation you had with the defendant.

A The defendant handed me a coke at this time. He asked me if I smoked marijuana, and I told him that I had smoked it; that I usually don't smoke it; that I dealt in narcotics; that I was a narcotic user, and he then asked me if I took LSD, and I told him, "No," and he handed me this coke.

THE COURT: Coke, is that what I understood you [74] to say?

THE WITNESS: Yes, Coca-Cola.

THE COURT: In a bottle or—

THE WITNESS: In a container, in a cup.

He then handed it to me and said, "Here, if you want to deal with me, you are going to have to take a drink of this. It has an acid in it," referring to LSD, and I did notice that there was a powdery substance floating on the top of the Coca-Cola container.

I told him that I did not wish to take any because I was afraid with the quantity of money I had on me, the \$500 which I had shown to him; that I might be robbed, and I was afraid that he might rob me or his friends; therefore, I didn't want to take any narcotics. I merely wanted to make our transaction, and he told me that he didn't deal with anybody unless they took some narcotics with him.

He says, "There are too many undercover officers, and for all I know, you're one," and he said, "You come with me and we will smoke some marijuana, and then I'll give you all the marijuana or whatever you want the following day," and I did not agree.

I showed him the money.

I says, "If you want to deal, you bring the stuff," and he says, "Well, you give me the money."

I said, "No, we'll have to go hand in hand." [75]

I said, "You hand me the narcotics, and I will hand you the money," so we did not come to an agreement, and I left.

MR. IDEMAN: That's all.

Cross examine.

CROSS EXAMINATION

BY MR. COONEY:

Q Officer, when you had this conversation with Mr. Green, was Mr. Porter nearby?

A He was inside the hot dog stand.

Q And you were standing outside?

A That's correct.

Q And this hot dog stand has an open serving area where they serve from the outside—from the inside to the outside; is that correct?

A Yes, there are windows.

Q Now, did Mr. Green tell you that there was some marijuana underneath a car nearby?

A He told me, "If you want to do business with me—" would I agree upon—he said, "For instance, that station wagon there, if I put the marijuana underneath there and told you where it was at, would you go pick it up?" and I says, "No."

I says, "How do I know but what there is something else in there other than marijuana? You will [76] have to hand it to me."

He says, "I'm not going to hand it to you hand in hand."

Q Did you go over to the station wagon?

A No, I did not.

Q Did you take some steps towards the station wagon?

A No, I did not. He was merely using it as an example.

MR. COONEY: I have nothing further, your Honor.

MR. IDEMAN: That's all.

THE COURT: All right, what about this witness? Is he excused?

MR. IDEMAN: As far as the People are concerned, yes.

MR. COONEY: I have no need for him, your Honor.

THE COURT: All right, you can get your car off the street now, Officer.

MR. IDEMAN: Oh, let's say for the record, that he is excused subject to recall.

THE COURT: All right, you are excused, Officer, subject to recall.

THE WITNESS: Thank you.

MR. IDEMAN: Oh, I have one other question.

Officer, is that the carton—that was the carton in which it was contained when you bought this [77] Exhibit 1, the plastic covering?

THE WITNESS: Yes, this is the one. It has my initials on it.

MR. IDEMAN: Your Honor, I have a certification—

MR. COONEY: We will stipulate to that.

MR. IDEMAN: Fine; may it be stipulated that—
How old is he?

MR. COONEY: Twenty-five.

MR. IDEMAN: May it be stipulated, counsel, that the birth date of this defendant is January 26, 1942?

MR. COONEY: So stipulated.

THE COURT: January 26, 1942?

MR. IDEMAN: Yes.

People rest, your Honor.

THE COURT: What is your—what age would that make it, then, at the time of the alleged offense?

MR. IDEMAN: Twenty-four.

THE COURT: All right. Prosecution rests?

MR. IDEMAN: Yes, your Honor.

THE COURT: All right, Mr. Cooney.

MR. COONEY: I would like to recall for further cross examination, Mr. Porter, your Honor.

THE COURT: Mr. Porter?

MR. COONEY: Yes. [78]

DEFENSE

MELVIN JOHN PORTER,

a witness called by and on behalf of the People, having been previously duly sworn, was recalled and testified further as follows:

THE CLERK: State your name again for the record, please.

THE WITNESS: Melvin John Porter.

FURTHER CROSS EXAMINATION

BY MR. COONEY:

Q Mr. Porter, directing your attention to People's 1^o in evidence here, I show you what appears to be a large plastic bag with white printing along the side and some red initials and some black initials on it.

Contained in this plastic bag is some green leafy material. Have you seen this bag or these contents before, to the best of your recollection?

A. The grass? Yes, I think so; I mean, it is probably grass, yeah.

Q You have seen something similar to the green leafy substance?

A Yes.

Q How about this particular bag? [79]

A No, the bags that I had didn't have any writing on them at all.

Q Didn't have any writing on them?

A No.

Q How about—did it have this white printing along the border?

A Not to my knowledge, no.

Q Were the bags that you—was the bag that you sold to Officer Dominguez, did it contain more green leafy substance than appears to be in this bag?

A I couldn't remember, you know, about how much. I just sold to him as a half a can.

Q The bag that you sold to Officer Dominguez, did it have a little flap to tuck under the top part of the plastic bag?

A No, it was a large bag like that (indicating).

Q A large bag like this, but it didn't have the white printing on it?

A No, not to my knowledge, it didn't.

THE COURT: Can we identify this white printing for the record?

MR. COONEY: That is running parallel to one side, yes.

"Warning. This is not a toy. To avoid dangerous suffocation, keep this plastic bag away from babies and children. Don't use in cribs, beds, carriages [80] or play pens. J.K."

THE COURT: All right, counsel stipulate that that was the printed wording on this bag as read by counsel?

MR. IDEMAN: I will take his word for it.

Q BY MR. COONEY: Now, Mr. Porter, approximately on January 20, 1967, did you—

THE COURT: I'm sorry, counsel, I can't hear you.

Q BY MR. COONEY: Approximately January 20, 1967, did you arrange a meeting between Officer Dominguez and Mr. John Green?

A I don't know the day, but I did arrange a meeting for them.

Q Did you arrange a meeting between these two because you wanted Mr. Green to find out whether or not Officer Dominguez was a police officer?

A Well, at the time I was pretty sure he was, but I was not positive, but the main thing was John wanted to sell him \$500 worth of either peat moss, if he wanted grass, or baking soda if he wanted acid.

THE COURT: Miss Reporter, read back that answer, please.

(Answer read by the reporter.)

Q BY MR. COONEY: Well, now, you told—did you tell Mr. Green that you thought this Mr. Dominguez, Ray Dominguez, was a police officer? [81]

A Yes, I did.

Q You told him that?

A Yes.

Q This is before the meeting that he had?

A Yes, sir.

Q Did you ask Mr. Green to find out or find out whether or not he was a police officer?

A I might have. I couldn't be positive.

Q Now, you remember testifying at the preliminary hearing in Van Nuys, don't you?

A Yeah.

Q Do you remember testifying as follows—

MR. COONEY: Counsel, page 16, line 26.

Q BY MR. COONEY: (Reading)

"Q After you picked up the shopping bag in the back yard of John Green's parents' house, what did you do with it?

"A Took it over to my house.

"Q Now, was anybody with you at the time you picked this up?

"A Yes, sir, there was Bob Smutz.

"Q Bob Smith?

"A Bob Smutz."

Now, do you remember testifying to that?

A Yes, I am pretty sure I said that, yeah.

Q Do you remember making a statement to the [82] police officer sitting here on my right—

I'm sorry; your name?

OFFICER WADE: Officer Wade.

Q BY MR. COONEY: —Officer Wade, on January 31, 1967?

A Well, what do you mean by a statement?

Q Did you make a statement to him about getting marijuana or buying marijuana or selling marijuana?

A Yes, I did.

Q Do you recall what you told him at that time?

A Um-hmm. Let's see.

Well, it had to do with buying it from John, yes, sir.

I mean, I couldn't say exactly what went on or not.

Q Well, do you remember telling the officer that Mr. Green phoned you up and told you that he, Mr. Green, had some marijuana and wanted to bring it over and leave it at your house?

A I might have said that, yeah.

Q Do you remember telling him that Mr. John Green had brought the marijuana over to your house that day, the day that you had the conversation with Mr. Green?

A I think—let's see. [83]

Yes, I think so.

Q Now, at the time that you made this statement to the officer, did you believe that you were telling the truth?

A Yes, sir.

Q At the time that you testified under oath in Van Nuys at the preliminary hearing, did you believe you were telling the truth?

A Yes, sir.

Q And at the time you testified today here in court, did you believe that you have told the truth?

A Yes, sir.

Q Now, at the time that Mr. Green had this meeting with Officer Dominguez, this was at Gus' Hot Dog Stand; is that correct?

A Yes, sir, Gus' Drive-In and Grill.

Q And you were standing nearby, were you not, when they had this meeting?

A Well, I was working, and I was sweeping up the patio.

Q Did you overhear bits of their conversation?

A No, I don't think so.

Q You heard them talking, but you don't recall what they said?

A No, they were outside, and I was inside.

Q Oh, you were inside? [84]

A Yeah.

Q You were inside, and you never went outside?

A No, well, the patio is inside, you know.

Q In January of 1967, did you ever make a statement to Mr. Blackmore in substance stating that you were going to get even with John Green because he had re-possessed your automobile?

A Well, I told him I was mad about it because I just had a little more time till my next pay check to

come, and then I could have paid off what I owed him.

Q Was this before or after you were arrested?

A Well, I—he said I had to give him the pink slip the night that I was arrested.

Q How many of these Baggies did you say were stolen from your house?

A I don't know. I mean, I sold about six, seven,—oh, maybe eight of them, and the rest—and take away one. I think the rest of them were stolen. About that many, I don't know.

MR. COONEY: Nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. IDEMAN:

Q Melvin, you say that you suspected Officer Dominguez was a police officer? [85]

A Yes.

Q And he wanted to buy \$500 worth of narcotics; is that correct?

A Yeah.

Q And you didn't have that much narcotics to sell to him; is that correct?

A No.

Q So you sent him to the defendant because you felt that he would have that amount to sell him; right?

A Well, John was never going to sell him anything because I just told John that night that I just sold some stuff to a narcotic officer.

This was about a day or so after, and then he insisted, or it was his suggestion that, "If he calls back, why don't you tell him—tell him to call me, and that we will sell him \$500 worth of something else," and later I found out it would probably be peat moss or baking soda.

Q Isn't it true that the defendant brought marijuana to your house on many different occasions?

A He brought it on a couple of occasions.

MR. COONEY: Your Honor, I move to strike that answer unless this is being offered for a limited purpose.

THE COURT: What is this offered for?

MR. IDEMAN: Of showing identity. That is the principal reason; that it is showing identity. [86]

MR. COONEY: Identity of what?

MR. IDEMAN: Identity of the person who furnished that marijuana between the 1st day of January and the 10th day of January.

MR. COONEY: Your Honor, I don't care if this man has delivered marijuana to his house fifty different times. That is not the charge.

The charge is, did he give the marijuana to this boy on this date that he is charged with.

THE COURT: I agree with that, but now this is a trait in issue or is this a—

MR. IDEMAN: It is not trait your Honor. It is another act offered to show the factor material to the People's case, which is identity.

Other acts that are sufficiently similar in nature can be shown and proved to prove identity. The fact that a man furnishes narcotics to a particular minor on one occasion has certainly strong probative value that he may be the one that furnished that narcotic on another occasion.

THE COURT: What is your authority?

MR. IDEMAN: I will be happy to submit authority to the Court. This is—

THE COURT: All right, I would like you to.

As I say, unless this is like the case of a man who committed ten other burglaries and in the same [87] fashion, I can't see the admissibility of another transaction unless it is alleged as being admissible to prove this particular transaction; and as I say, I don't see a trait issue, or I don't see some—I will be glad to have your authority. I will reserve my ruling on it to a later time.

It appears that we are going to have a jury that is coming in on another matter.

How many more witnesses have you?

MR. COONEY: My witnesses are very short, your Honor; not in stature, but testimony. I would say probably—

MR. IDEMAN: Excuse me, your Honor, but I would like to get this particular testimony from this witness now subject to a motion to strike if your Honor is not satisfied with my authority before he leaves tonight.

THE COURT: Well, I will accept it subject to a motion to strike, and I am inclined to believe—unless you have some good authority, I will not allow it to stand. The burden is on you to get the authority tomorrow.

MR. IDEMAN: All right.

Q BY MR. IDEMAN: Now, these couple of other times, when the defendant furnished narcotics to you or marijuana to you, when was that?

A Well, I wouldn't know the dates. [88]

Q Approximately when?

A Well, I don't know. This is maybe sometime between—let's see—oh, let's see, it was in the short time that I was using it.

Q Pardon?

A It was in the time that I was using it.

Q That was a period of how long?

A About two months before I was arrested.

Q So, in a period of approximately—well, did he furnish to you before Christmas of last year?

A Yeah.

Q Did he give you some after Christmas?

A Yeah, I think. I don't know—I mean, I don't know. I don't keep a calendar of the exact date.

Q Well, could it have been after the first of the year that he gave you some?

A He might have. He might have not. I couldn't say for sure.

Q On the two occasions how much did he give you on each of those occasions?

A Just a couple of joints.

Q Did he give you enough to sell?

A No.

Q Did you sell it?

A No, I just—they were just about—well, I think. I got six cigarettes from him before. [89]

Q You smoked them yourself?

A Yeah.

Q They were marijuana cigarettes?

A Yes, I guess so.

Q It made you fell like the other cigarettes that you had smoked that were like marijuana, right?

A In a sense, yes.

Q Now, counsel asked you a question about your being angry with the defendant about something about a car.

A Yeah.

Q Did you tell somebody you were going to get even with him for—

A Well, I just told Rusty I was real mad because I only had a few more days till I was to get paid.

Q When did you make that statement?

A It was—John called me up that day.

Q What day?

A The day I got arrested, and the day I gave him the pink slip. He said he wanted the car back and—

Q Melvin, the question is when did you make the statement to this other fellow?

A Same day.

Q What is his name?

A Rusty Blackmore.

Q Rusty Blackmore? [90]

A Uh-huh.

Q Did you say you were going to get even with him?

A I don't—I said I was really mad about it.

I might have said it; I don't know. I couldn't say—I mean, I don't remember.

Q When were you released from custody? How long did you spend in jail?

A I was—how long was I in jail?

Q Yes.

A Just about 21 days. I got out on the 16th.

Q You got out of jail sometime in February?

A Uh-huh, February 16th.

Q At the time of the preliminary hearing on February 8th, were you in custody at that time?

A Yeah.

Q And you got out about a week or so after that?

A Yes, eight days.

Q Has anybody talked to you about this case since you got out of custody?

A No.

Q Has the defendant talked to you?

A No, that's one of my things on probation. [91] You see, I'm not supposed to associate with him.

Q Has he talked to you about the case, or has he talked to you at all?

A No.

Q Has anyone else talked to you?

A No, not about the case. I mean, Rusty—those guys are all friends of mine. I talk to them all the time, but not about this case.

Q Some of the defendant's witnesses, have you talked to them?

A Yes, but not about the case.

Q You have never mentioned the case to them?

A No, I didn't know they would be involved in it.

Q Have you talked to the defendant's attorney, Mr. Cooney?

A No.

Q Except in court, naturally?

A Yes, today.

Q Now, Melvin, you state that you took—were you high on LSD the day that you got the marijuana that we are talking about?

A Yeah.

Q Where did you get that LSD?

A From a guy down at the Topanga Plaza. [92]

Q Where?

A The guy that's down at the Topanga Plaza.

Q What's his name?

A Lug Head, or something like that. He's always goofed up.

Q Pardon?

A Well, you know, he over-dosed on it once, and he is mentally weird now. That's why we call him Lug Head, I guess.

Q Do you know his full name?

A No.

Q Do you know where he lives?

A No, I just know that he's down at the Topanga Plaza quite often.

MR. IDEMAN: That is all I have of this witness, your Honor.

MR. COONEY: Nothing further, your Honor.

THE COURT: All right, counsel, what is your pleasure? Do you want to go ahead?

First, we will have to bring this jury in and discharge them.

MR. IDEMAN: I would like to have Mr. Porter ordered back for tomorrow anyway; so you can have him tomorrow.

THE COURT: I have to rule on this objection yet, and you're to get some authorities. I will not be able [93] to finish with him in any event.

MR. COONEY: Well, I am sure that he is not going to be able to find it.

I have a couple of short witnesses, if your Honor please. Not by stature, but their testimony will be brief. If we can put them on now, then it will leave only the defendant for tomorrow.

THE COURT: Is that agreeable with counsel?

MR. IDEMAN: Yes, your Honor.

THE COURT: Well, let's excuse him now, and will you be able to get him back tomorrow?

MR. IDEMAN: Yes, if your Honor would order him back.

THE COURT: All right.

Mr. Melvin Porter, without further notice or order of the Court you are to return here at 10:00 o'clock tomorrow morning.

Well, let's see—can you be here at 9:30?

MR. COONEY: Yes, I will be here.

MR. IDEMAN: Yes.

THE COURT: You don't have any calendar to answer anywhere that will keep you until 11:00 o'clock?

MR. IDEMAN: No, your Honor.

THE COURT: All right. Mr. Porter, then you will return here without further notice or order at [94] 9:30 tomorrow morning.

THE WITNESS: Yes.

THE COURT: Don't take any LSD tonight before you get back here in the morning.

THE WITNESS: Okay.

THE COURT: Return here sober. All right, you will be excused, and you will be back here at 9:30.

(Proceedings had on unrelated matter.)

THE COURT: All right. Back to People versus John Anthony Green.

Are there some witnesses you wanted to call?

MR. COONEY: Yes, your Honor. I have three very short witnesses.

Defense will call Mr. Blackmore first.

DANIEL BLACKMORE,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Daniel Blackmore.

THE CLERK: Spell the last name, please.

THE WITNESS: B-l-a-c-k-m-o-r-e. [95]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Blackmore, are you acquainted with Mr. Melvin Porter?

A Yes, uh-huh.

Q Were you also acquainted with Mr. John Green?

A Yes, sir.

Q Now, directing your attention to the month of January of 1967, did you have a conversation with Mr. Porter relative to Mr. Green's repossessing an automobile which had been sold to Mr. Porter?

A Yes, I did.

Q What did Mr. Porter tell you?

A Well, he was mad because John couldn't make it, so he took back the car. He said he was going to get back at him.

Q He said he was going to get back at Mr. Green?

A Yes.

Q Then subsequently Mr. Porter was arrested; is that correct?

A Yes.

Q Are you acquainted with Mr. Porter's reputation in the community wherein he lives and goes to school with respect to the character traits of truth, [96] honesty, and integrity?

A It is not real good. It is very bad.

Q You are acquainted with it?

A Yes.

Q What is it?

A It is bad.

MR. COONEY: Nothing further, your Honor.

MR. IDEMAN: I have no questions.

THE COURT: All right, you may be excused, then, Mr. Blackmore.

Mr. Blackmore, you are excused from further attendance by both counsel. You may return to school or wherever you go, and you won't have to return tomorrow.

THE WITNESS: Thank you.

MR. COONEY: We will call Mr. Smutz as our next witness.

ROBERT SMUTZ,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Robert Smutz.

THE CLERK: Will you spell the last name, please.

THE WITNESS: S-m-u-t-z. [97]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Smutz, are you acquainted with Mr. Melvin Porter?

A Yes, I am.

Q Do you know where John Green's parents reside?

A I do now.

Q Now, directing your attention to a period of time between the 1st day of January of this year and the 10th day of January of this year, did you at any time accompany Mr. Porter from his house over to the house of Mr. Green's parents?

A No.

MR. COONEY: I have no further questions of this witness.

MR. IDEMAN: No questions.

THE COURT: All right, is this witness excused?

MR. COONEY: Yes.

THE COURT: All right, Mr. Smutz, you go back to your work. You are excused from further attendance.

THE WITNESS: All right.

MR. COONEY: Would you tell Mr. Davis to come in.

THE WITNESS: Yeah. [98]

HARRY LANIER DAVIS,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Harry Lanier Davis.

THE CLERK: Spell the last name, please.

THE WITNESS: D-a-v-i-s.

THE CLERK: Spell the middle name, too, please.

THE WITNESS: L-a-n-i-e-r.

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Davis, are you acquainted with Melvin Porter?

A Yes, I am.

Q Are you familiar with his reputation in the area wherein he lives and goes to school, with respect to his character traits of truth, honesty and integrity?

A Yes, I am.

Q What is that reputation?

A Not very good.

MR. COONEY: Nothing further, your Honor.

MR. IDEMAN: No questions. [99]

Los Angeles, California

Thursday, April 6, 1967

9:30 A.M.

THE COURT: People versus John Anthony Green.

MR. COONEY: Yes, your Honor, defendant is present with counsel and ready to proceed.

MR. IDEMAN: People are ready.

THE COURT: All right, do you want to educate counsel and the Court with your authority?

MR. IDEMAN: Yes, your Honor. The matter we discussed yesterday, the matter of other acts by the defendant of furnishing marijuana to the same minor on other dates not charged, I found a case that is on all fours and supports the People's position.

This is People vs. Sykes, 44 Cal 2d at page 166, head-note 6, which is discussed—

THE COURT: What are the facts and the ruling?

MR. IDEMAN: —on page 170. This was a defendant who was prosecuted for furnishing marijuana to a minor girl, and he was charged with furnishing her with cigarettes which she smoked on one particular date, and she was also permitted to testify that the defendant furnished her with the marijuana cigarettes on another date.

THE COURT: Though he was not charged with supplying on another date? [102]

MR. IDEMAN: Not charged on another date.

First, the Court said that no objection was made to it; so they couldn't raise it on appeal, but they went on to discuss, "Moreover—" this is footnote 6, reading on page 170.

"Moreover in cases based upon the commission of certain types of crimes, evidence of similar conduct of the defendant with the same person

who is named in the Information or Indictment quote, is admissible to show the disposition of the defendant to connect the act charged and the probability of his having committed it unquote; citing People vs. Jewett, '84 Cal Ap. 2d pages 276 and 279."

THE COURT: Let's go back here.

So, trait is in issue; that is what it amounts to. I didn't realize that would be considered as trait in issue.

MR. IDEMAN: First, if your Honor please, let me finish.

"This rule has been applied in prostitution, for sex crimes, and upon a charge of pimping. People vs. Bellamy, 79 Cal App 160.

"The reasons for applying that rule [103] where the charge is furnishing narcotics to a minor are just as compelling as in sex cases."

THE COURT: What do you have to say, counsel?

MR. COONEY: Well, I think everybody is agreed here that under the circumstances certain acts of prior misconduct can be shown where it tends to show habit, scheme, or design, or a pattern of conduct.

My only objection yesterday was that here the defendant is charged with the supplying of marijuana or a substance—well, the substance is giving him the 29 Baggies; which is a pound or a kilo or something like that, to sell.

At least one of the stories is that he gave it to him to sell, and a transaction a month or two before where he gave him marijuana cigarettes to smoke, and in one instance he gave him the marijuana in bulk to sell, and in another instance, according to the testimony of the witness, he gave him marijuana to smoke; how-

ever, I will withdraw the objection, your Honor, because it just all boils down to whether or not the Court is going to believe—

THE COURT: Whether or not to believe Porter or the defendant.

MR. COONEY: Yes. If your Honor is going to believe Mr. Porter as to his giving him this marijuana [104], cigarette, then it justifiably could believe Mr. Porter as far as giving him a whole shopping bag full.

THE COURT: Let me go back to this.

What about the other offer of proof that I wouldn't allow, which was made by the prosecution, going into these other acts.

We limited the testimony of this witness, Officer Wade, to only the statements about the offering of the—I mean, about the delivery of the merchandise and so forth on this 10th day of January.

MR. IDEMAN: I believe that evidence should be admitted by the Court, because the evidence is that the defendant has delivered substantial amounts—

THE COURT: What is the offer again? What he had done on prior occasions?

MR. IDEMAN: That was approximately what—with respect to that, that during the preceding five months preceding January 31, 1967, that the defendant brought large quantities of marijuana to the victim's home and gave it to the victim to hold, and on some occasions the victim used some of this and paid the defendant for it, and that the buyers would come to the victim's house and purchase the marijuana from the victim, and he would sell it to them and turn the money over to the defendant—

MR. COONEY: Well, I will stipulate—

MR. IDEMAN: —and that the suspect, the [105] defendant, made, during these five months, deliveries of large quantities of marijuana approximately once a week to the victim's home; and based on People vs. Sykes, this is admissible.

MR. COONEY: I will stipulate that this statement was made by Mr. Porter to this officer on January 31st.

THE COURT: All right.

MR. IDEMAN: May the officer be deemed to so testify?

THE COURT: So stipulated?

MR. COONEY: Yes.

THE COURT: All right, that the officer would so testify?

MR. IDEMAN: Fine; People rest.

MR. COONEY: Yes.

THE COURT: All right, Mr. Cooney.

MR. COONEY: Yes, your Honor.

Mr. Green, take the stand, please.

JOHN ANTHONY GREEN,

the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

THE CLERK: Take the stand and state your name, please.

THE WITNESS: John Anthony Green. [106]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Green, you are acquainted with Melvin Porter, are you not?

A Yes.

Q How long have you known him, Melvin Porter?

A About five or six years.

Q Did you live in the same neighborhood with him?

A Yes, he lives three doors down the street.

Q Did you also know these other witnesses for the defense who have testified, Mr. Blackmore and Mr. Davis, and Mr. Smutz?

A Yes, I know them.

Q Do they live in the neighborhood, too?

A Mr. Blackmore and Mr. Davis live in the same neighborhood, and Mr. Smutz lives about a mile away.

Q Now, have you ever supplied any marijuana to Mr. Porter on any occasion?

A No, sir.

Q Now, you have heard some testimony—strike that.

Did you, during the year 1966, sell an automobile to Mr. Porter?

A Yes, I did.

Q And at a later date in 1967 did you [107] re-possess that automobile?

A Yes, sir.

Q Was there any reason why you re-possessed the automobile?

A Yes, after six months he failed to pay the total amount of the purchase price.

Q And you took the car back?

A Yes.

Q Now, on January—on or about January 20th did you have a conversation with a Mr. Dominguez?

A Yes, sir, I did.

THE COURT: Is that the officer?

THE WITNESS: Yes.

THE COURT: Who testified here?

Q BY MR. COONEY: Will you tell us how you happened to have a conversation with Mr. Dominguez?

A Well, I called Melvin Porter, and I asked him about the car, and he said he had a problem and that I should come over and talk to him, and he wouldn't tell me what it was over the telephone.

When I went over there, he said that he was pretty sure he had sold some marijuana to a narcotic agent, and he asked me if I would talk to the agent and try and determine whether he actually was a police officer or not; and then he came up with this idea that if he was, to say that he had \$500 worth of marijuana for sale; that [108] John would sell him some peat moss instead of marijuana.

Q Did you contact Officer Dominguez?

A Yes, I did.

Q After you contacted him, did you arrange to meet him some place?

A Yes, John asked to have the meeting at the hot dog stand where he works.

Q When you say "John"—

A John asked me to—

Q Who is John?

A John Porter. That is the name that I usually call him. I guess Melvin is his legal name.

Q Is it Melvin John Porter?

A I guess that is it.

Q Will you say "Mr. Porter," so we won't confuse things here?

A Yes, okay.

Q Okay, Mr. Green, so you arranged to meet Officer Dominguez somewhere?

A Yes.

Q Now, at the time that you arranged to meet him somewhere aside from what Mr. Porter told you as to his suspicions, did you have any knowledge that Mr. Dominguez was a police officer?

A No, I didn't.

Q So you —did you meet Mr. Dominguez that [109] same day at the hot dog stand?

A Yes, later on that night.

Q Was this at a time when Mr. Porter was working there?

A Yes.

Q Pardon?

A Yes, sir.

Q Now, you have heard Officer Dominguez testify as to what the conversation was between you. Is that conversation substantially correct?

A Yes, except for one part.

Q What part is that?

A When I told him that there could be some marijuana underneath that car over there, he took off on a run towards that car, and I called him back and I said that I was only kidding.

Q Did you offer him a Coca-Cola?

A Yes, I did.

Q Did you have anything in the Coca-Cola?

A Yes, I had an aspirin floating on the top.

Q Was there any reason why you were—why you had offered him this Coca-Cola?

A Yes, I was reasonably sure that narcotic agents couldn't consume any narcotics, and that he would turn it down even if he didn't know it was aspirin or did know.

Q Why did you agree to talk to the—why [110] did you do this for Mr. Porter? Any particular reason?

A Well, I always felt sorry for him.

You know, I tried to help him out. Like I gave him the car and told him he could pay me for it later, and he stretched it out to about six months, and I just, you know, tried to do him another favor.

Q Did you, during the five or six years that you have known him—have you had a certain relationship with Mr. Porter?

A Well, he always came down and helped me work out on my cars, and so I felt I owed him something.

Q Did you ever play games or go places with him?

A Well, I used to take all the guys to the beach in the neighborhood, and played football with them in the street.

MR. COONEY: Thank you. I have nothing further.

THE COURT: All right, Mr. Ideman?

MR. IDEMAN: Thank you, your Honor.

CROSS EXAMINATION

BY MR. IDEMAN:

Q Mr. Green, had you ever discussed narcotics with Mr. Porter before the date you talked to Officer Dominguez?

A Yes, I have. [111]

Q Had you ever supplied him with any narcotics?

A No, I haven't.

Q Do you deal in narcotics?

A No, I don't.

Q Did you deal in narcotics at about the time of January, 1967?

A No. [112]

Q Now, how was it that you had discussed narcotics with Mr. Porter before the date that you talked to Officer Dominguez?

A Oh, several different occasions Mr. Porter offered me marijuana cigarettes to smoke.

Q You knew they were marijuana?

A When he said they were marijuana I took his word for it.

Q Had you ever seen marijuana before Porter showed it to you?

A I haven't seen marijuana period. I don't even know what it looks like.

Q Before Porter showed you what he said was a marijuana cigarette, had you ever seen marijuana?

A He showed me a cigarette that was wrapped up, but I didn't see any marijuana inside of it.

Q Well, before that time had you ever seen [128] anything that looked like marijuana?

A No.

Q Were you familiar with the going price for marijuana?

A Well, yes, I guess I was familiar with it.

Q How did you become familiar with the price of marijuana?

A I heard people talk.

Q Who did you hear talk?

A Different—you know, friends and that—

Q What were their names?

A Well, I don't remember offhand.

When you hear somebody say they paid \$10 for such-and-such a thing or whatever it is—

Q Give me the name of one person that you heard talk about it.

- A Ralph King.
- Q How old is he?
- A I don't know; he's over 21.
- Q Where does he live?
- A I don't know.
- Q Do you know what part of the City or County he resides?
- A Canoga Park.
- Q Do you know his telephone number?
- A No. [129]
- Q What—where does he live?
- A In Canoga Park.
- Q Do you know what street?
- A No, I don't.
- Q Have you been to his house?
- A Yes, I have.
- Q But you don't remember the street?
- A He has moved since then.
- Q Does he use marijuana?
- A Does he use marijuana?
- Q Have you ever seen him use marijuana?
- A No, I haven't.
- Q How long have you known him?
- A Oh, about three years.
- Q Did he talk to you about the price of marijuana?
- A No, he hasn't.
- Q Who did he talk to about the price of marijuana?
- A A person I never saw before.
- Q When was that date-wise?
- A I think it was in 1966 somewhere.
- Q Approximately when?
- A Oh, in the middle of the year.

Q Last summer?

A It could have been last summer. [130]

Q Was that at King's house?

A No.

Q Where was it?

A It was in back of a bar in Reseda or Tarzana.

Q What were you doing at the bar?

A Visiting a person that owned the place.

Q Was that person Mr. King that you talked to about the price of marijuana?

A No.

Q Were you there with Mr. King?

A No, I wasn't there with Mr. King. He happened to be there at the same time that I was.

Q Mr. King had a conversation with an unknown man about the price of marijuana in back of the bar; is that correct?

A Yes, he was unknown to me.

Q How did you happen to be at that conversation?

A I just happened to be there in the back of the bar by my car.

Q Who else have you ever heard discuss the price of marijuana?

A Do you want the names of all the people?

Q Yes.

A Well, I really don't think there's that [131] many. There might be one or two, just chance things, you know.

Q What are their names? Name one.

A One of them was Jimmy Thompson, across the street.

Q Across the street from where?

A From where this bar is. His father owns a typewriter shop.

Q How many times had you heard Jimmy Thompson discuss the price of marijuana?

A Well, I don't remember whether I ever heard him discuss the price of marijuana or not, but I heard him mention marijuana once as to—

Q To whom was he mentioning that?

A To who? He was talking to himself. He was more or less talking to himself. He said he was going over and smoke some dope.

Q All right. Who else?

A I don't think I ever heard anybody talk about marijuana.

I really don't associate with those kind of people.

Q Why did you—I think counsel asked you, but I would like to ask you again if I may.

Why did you decide—did you think that Mr. Porter had perhaps sold some marijuana to a police [132] officer?

A Yes, that is what he said.

Q You were aware that that is a crime to sell marijuana?

A Oh, yes.

Q No doubt about that in your mind, is there?

A Well, no.

Q All right. Did you know that it is a crime to offer to sell marijuana whether you deliver it or not?

A I'm not very familiar with the marijuana laws at all.

Q Did you think that by offering to sell marijuana and LSD to a police officer that you might get into trouble?

A I didn't see how.

Q You said you did not?

A Well, I have now.

Q You are telling us that you offered to sell \$500 worth of marijuana and LSD to a man that you knew to be a police officer. Is that your testimony, sir?

A No, I didn't offer to sell \$500 worth to a police officer.

Q You offered to sell him marijuana and LSD, didn't you?

A No, I didn't. [133]

Q Mr.—your counsel asked you if the officer's testimony—

A I was asking that for John.

Q I beg your pardon?

A I said I was asking for John.

Q Yes. But you did have a conversation with the officer in which you said that you would sell him marijuana and LSD, didn't you?

A Oh, yes, yes.

Q It is your testimony that you suspected and had good reason to believe that this was a police officer that you were selling this to, didn't you?

A Well, I had a good indication of that from John's word only. I couldn't tell just by looking at the guy.

Q But you didn't feel that you could get into trouble by doing this?

A Well, if I didn't sell him anything, or just talking to a person.

Q You didn't know that it was equally against the law to offer to sell as well as to sell?

A No, I didn't.

Q Did you tell him that you would sell to him on the condition that he would—that he would fix with you?

A Fix? [134]

Q Well, did you say take some LSD or marijuana with you? Did you tell him that?

A I asked him if he cared to smoke marijuana with me.

Q Why did you ask him that?

A Well, I already told you. I didn't think at the time that a narcotic agent could take any dope or use dope.

Q That was the way that you were going to find out whether he was in fact an officer; right?

A Well, I thought it was pretty good.

Q All right. Suppose he said, "Yes, I'll take some." What would you have done then?

A I don't know, because I didn't have anything there.

Q Where did you have it?

A I didn't have anything anywhere.

Q Did you offer to sell five kilos?

A I think I did mention something about that.

Q Where did you learn the term "kilo" regarding marijuana traffic?

A I had this book that I had read that Mr. Porter gave me.

Q What book?

A It's called "Nightmare Drugs." [135]

* * *

THE COURT: Now, let's go back to Porter.

After he watched you and helped you casually with your automobile, when did you first hear him discuss the matter of marijuana?

THE WITNESS: I happened to be over at his house, and he mentioned the fact that he started smoking marijuana.

THE COURT: When was that, Mr. Green, approximately?

THE WITNESS: It was in 1966 sometime.

THE COURT: What time in 1966?

THE WITNESS: I think during the summer of 1966.

THE COURT: That made him then about 16?

THE WITNESS: Yes, sir.

THE COURT: What did he tell you about it?

THE WITNESS: He just said that he started smoking marijuana, and I asked him, "What for?" and he just said, you know, "Just for kicks and to get high."

THE COURT: Did you ask him where he got it?

THE WITNESS: No, I didn't, sir.

THE COURT: All right. What was the next [147] conversation you had with him since that summertime about the subject of marijuana?

THE WITNESS: I don't think I ever had another conversation with him about marijuana.

I just told him right then and there I didn't want to hear any more about that stuff.

THE COURT: Did you ever have any conversation about LSD?

THE WITNESS: No, sir.

THE COURT: How many times—did Porter ever smoke marijuana in your presence?

THE WITNESS: He never has, sir.

THE COURT: Did he ever tell you where he got his marijuana?

THE WITNESS: No, sir.

THE COURT: Did you ever ask him where he got it?

THE WITNESS: No, sir.

THE COURT: At no time did you ever discuss LSD with him?

THE WITNESS: No, sir.

THE COURT: Did you return Porter's down payment he made of the car that you re-possessed?

THE WITNESS: No, sir.

THE COURT: When did you get the book about "Nightmare Drugs" from Mr. Porter?

THE WITNESS: In December. [148]

THE COURT: Of 1966?

THE WITNESS: Yes, sir.

THE COURT: When did Mr. Porter call you and tell you of his involvement with the sale of marijuana to the police officer?

THE WITNESS: I think it was in the middle of January.

THE COURT: Of 1967?

THE WITNESS: Yes.

THE COURT: Did he call you on the phone?

THE WITNESS: By phone, sir.

THE COURT: Where?

THE WITNESS: 6933 Cozycroft.

THE COURT: Did you have a telephone there?

THE WITNESS: Yes, sir.

THE COURT: Did he call you by phone?

THE WITNESS: Yes.

Well, he didn't tell me about the involvement over the phone. He just said he had a problem.

THE COURT: What did you tell him?

THE WITNESS: I asked him what it was, and he wouldn't say anything over the phone.

THE COURT: And what was the balance of your conversation?

THE WITNESS: He suggested that I come over there, and I asked what for, and he said, "So I can talk [149] to you," so I went over there.

THE COURT: You went to his residence on Bassett Street?

THE WITNESS: Yes.

THE COURT: And you had a conversation with him there?

THE WITNESS: Yes, sir.

THE COURT: And anybody else present besides yourself and Mr. Porter?

THE WITNESS: No, sir.

THE COURT: When did this conversation take place at his residence?

THE WITNESS: It was in the afternoon.

THE COURT: Of what day?

THE WITNESS: The same day that he called, sir.

THE COURT: What day was that?

THE WITNESS: It was somewhere in the middle of January closer to the first—between the 10th and the 15th, I think.

THE COURT: Sometime between the 10th and the 15th approximately?

THE WITNESS: I think so, sir.

THE COURT: Tell us, now, what the substance of

the conversation was that you had with Mr. Porter at Porter's residence the day that he had called you to his home, and you then went to his house between the 10th and [150] the 15th of January.

THE WITNESS: He mentioned the fact that a man came over to his house with another person, and that he sold some marijuana to him, and that he suspected that he was a narcotics agent, and he asked me what I thought he should do, and I said I didn't know, and then he asked me if I would talk to the man and try and determine whether or not he was a narcotic agent.

He also suggested that if he was that, or if I thought he was, or if he was, or maybe I could somehow give him \$500 worth of peat moss.

THE COURT: What do you mean by peat moss?

THE WITNESS: I guess he had a bale of some peat moss, and he was going to sell him the peat moss.

THE COURT: Is that a slang expression for marijuana?

THE WITNESS: I don't think so, sir. I think he had peat moss actually in mind.

THE COURT: What else besides peat moss was he going to sell him?

THE WITNESS: He had intentions of—if he wanted some LSD, he was going to give him baking soda.

THE COURT: And tell us about any other conversations you had then on this day after he called you at your apartment.

THE WITNESS: He gave me Ray's phone number. [151]

THE COURT: Pardon?

THE WITNESS: He gave me Ray's phone number. We also—he had already told Ray that he knew some guy named John. In fact, he didn't ask me before he told me. He just went ahead and said—and assumed that I would go through with this thing.

THE COURT: And what else was said then on this occasion that you met Mr. Porter at his residence?

THE WITNESS: He suggested that the hot dog stand would be a good place to set up a meeting so he could see what was going on.

THE COURT: That is the place where Mr. Porter worked?

THE WITNESS: Yes, sir.

THE COURT: What else was said on this occasion at Porter's residence?

THE WITNESS: I asked him about the car, and he still said that he hadn't money; that he was waiting for his next check or something.

THE COURT: How much had he paid on the car?

THE WITNESS: Twenty dollars.

THE COURT: Of the \$85 purchase price?

THE WITNESS: Yes, sir.

THE COURT: Any other conversation at this time at the Porter house?

THE WITNESS: That is about it, sir. [152]

THE COURT: Now, when you agreed to meet with this Ray, was that the name that was given?

THE WITNESS: Yes, sir.

THE COURT: At the hot dog stand?

THE WITNESS: Yes, he already gave me Ray's telephone number while I was over there, too.

THE COURT: Mr. Green, you told us that when you first learned that Mr. Porter mentioned the subject of marijuana to you, you told him you didn't want to hear anything about it; is that correct?

THE WITNESS: Yes.

THE COURT: What did you tell him when he mentioned the subject of marijuana and the negotiations with this man Ray when you had come over there to his house this date between the 10th and the 15th of January?

THE WITNESS: Well, I really didn't say anything, sir. I just looked at him. I didn't know what to say.

THE COURT: You didn't tell him that you didn't want to have any involvement during the discussion of the marijuana?

THE WITNESS: Well, I didn't say anything at all. I just, you know, I just looked at him, and he kept saying, "Well, what should I do? What should I do?"

THE COURT: And what did you say; that you would like to help him as an old buddy and get involved in [153] marijuana, though you didn't like it when he first mentioned it to you in the summer of 1966?

THE WITNESS: No, I said, "I don't know what you are going to do," and that is when he came up with the idea of finding out whether he was really a narcotic officer or not. [154]

Q After this meeting that you had with Mr. Porter at his home, did you or Mr. Porter call the [157] man identified as Ray?

A I did, sir.

Q What was your conversation with Ray on the telephone?

A I told him I was a friend of John's, and he asked me what my last name was, and I said that there was no reason why you should have to know my last name, and he said he was interested in buying some marijuana, and I asked him if he wanted to talk to me in person, and he said, yes, and I suggested that we meet at the hot dog stand where John worked, and we agreed upon a time, and that was all.

Q How did you identify him or he identify you at your get-together at the hot dog stand?

A I just told him I would have a green jacket on.

Q Did you tell him what kind of a car you would be driving?

A No, sir.

Q Was Mr. Porter to introduce you?

A No.

Q Did you arrive at the appointed hour in a green jacket?

A Yes, sir.

Q When did you concoct the idea of the acid test on this man? [158]

A That was after I made the telephone call.

Q And when did you secure the aspirin or whatever the substance was that you had in this Coca-Cola? When was that prepared?

A Well, I just went to the store and got some aspirin.

Q And when did you get the Coca-Cola?

A At the hot dog stand.

Q Was that done before or after the arrival of the other man?

A I only saw two people in there, and he was one of them that was there while I bought the coke.

Q And you put the white substance in his presence, or before you met him, or what was it?

A No, I was at a window on the outside of the building, and he didn't know that I was there when I put it in.

Q Had you bought the Coca-Cola before you met him, and you put the white substance in the coke before you met him?

A Yes, sir.

Q How did you introduce yourself to him when you identified yourself as being John?

A He approached me first and asked if my name was John, and I replied "Yes."

Q Then did you retire to some remote area [159] with this man, or did you stay near the stand, or where did you go to have a conversation with him?

A He asked me first if I cared to step outside, and I said, "Yes."

Q Where did you go?

A The big glass window—we just went outside the glass windows about two feet away from the hot dog stand.

Q Then what was said?

A He asked me if I had any marijuana or LSD for sale.

Q Tell us what he said, and what you said.

A I just replied that I might have some, and he asked me how much I was selling it for—

Q What answer did you give? Tell us what you said.

A I didn't answer him right then, and I asked what he wanted primarily, and he said he would rather have marijuana because marijuana is marijuana, and LSD could be anything, and I had this coke here, and I said, "Well, would you like to take some LSD right now?" and I showed him this coke with this aspirin bobbing around in it that I had broken up and—

Q Did you say the aspirin had broken up?

A No, I broke it up into little bits.

Q Did you put it in in his presence, or was [160] it already in the coke?

A I already broke it up when I put it in the coke.

Q You had already put it in before you had your conversation?

A Yes, sir.

Q In a broken form?

A Yes.

Q Then what next was said?

A Well, he jumped up a couple of feet, you know, jumped back a couple of feet, and he said that he never takes LSD, and then I asked him if he would care to go around the corner and smoke some marijuana, and he said, "No"; that he didn't want to smoke any marijuana; that he just wanted to buy.

Q Well, were you in a position to smoke a little marijuana with him at that time?

A No, sir.

Q Why did you offer to go around the corner and smoke it with him?

A Well, not necessarily go around the corner.

I even offered to take him to my house or to his

house, and he just didn't want to have anything to do with smoking marijuana.

Q Could you have produced some marijuana if you were to go to your house? [161]

A No, sir.

THE COURT: That's all.

MR. IDEMAN: Your Honor, I have a few more questions.

THE WITNESS: Sir, I have one more thing.

THE COURT: Yes?

THE WITNESS: He suggested that we go to his house, and maybe we could smoke some marijuana there after I sold some marijuana to him.

THE COURT: All right.

FURTHER RECROSS EXAMINATION
BY MR. IDEMAN:

Q Mr. Green, why would you not give Ray your last name over the telephone?

A I didn't think it was necessary.

Q Because you felt that you would be committing you were about to commit a crime, and you didn't want him to know who you were; is that correct?

A No, I felt that if he were a police officer, I didn't want my name broadcast all over.

Q Why?

A Well, why not?

Q You didn't want him to know who you were, did you?

A Not if he was a police officer. [162]

Q Did you believe him to be a police officer?

A No, I said, "not if."

Q If he was a police officer, you didn't want him to know who you were; is that correct?

A Well, I wouldn't especially care for him to know. I don't want to be associated with narcotics.

Q What did you hope to accomplish by finding out whether or not this man was a police officer?

A Exactly what John asked me to do, to tell him whether he was or not.

Q Well, did you want to make it possible for Porter to sell more marijuana to the man if he was not a police officer?

A No, I didn't.

Q Well, you know—you knew at that time, at the time you went to meet this Ray, you knew that if he was a police officer, that Porter was caught. You knew that, didn't you?

You knew that he would be arrested eventually; didn't you know that?

A Well, I imagine since he already sold to him, or he said he had.

Q Right; you knew in fact that if he was a police officer, that Porter was going to be arrested. You knew that?

A Yes. [163]

Q All right. If he was not a police officer—you knew that if you could prove that he was not a police officer, then Porter could sell to him some more, didn't you?

A I don't know what John was going to do.

MR. IDEMAN: Nothing further of this witness.

**FURTHER REDIRECT EXAMINATION
BY MR. COONEY:**

Q Did John ever make any statement to you about taking off or leaving?

A Not that I remember.

Q I beg your pardon?

A Not that I remember. He never discussed that with me.

Q Now, there was a question asked you about a down payment on the automobile.

A Had Mr. Porter actually given you a down payment?

A Yes, he had.

Q He gave you a down payment and took the automobile?

A No, he gave me some money after quite a while, after he had the car.

Q How long had he had the car?

A About three months. [164]

Q This Coca-Cola that you had, was there ice in it?

A No. [165]

* * *

MINUTES.

Superior Court of the State of California, for the County of Los Angeles. Department No. 77.

Apr. 7, 1967.

Present Hon. Prentiss Moore, Judge.

The People of the State of California vs. John Anthony Green. Case No. A101149.

APPEARANCES:

(Parties and Counsel checked if present. Counsel shown opposite parties represented.)

X Evelle J. Younger, District Attorney, by J. Ide-man, Deputy, E. J. Hovden, Public Defender, by Deputy.

X Terrence W. Cooney.

Trial is resumed from April 6, 1967. John Anthony Green is recalled and further testifies for Defendant. Defendant's Exhibit A (bank book) is marked for identification only. The People's Exhibit 2 (bank book marked as Defendant's Exhibit A for identification only) is admitted in evidence. Both sides rest. The cause is argued by both counsel. The Court finds the Defendant "Guilty" as charged. Defendant waives time for sentence. A Probation Officer's report is ordered. Motion for a new trial and Probation and Sentence hearing are set for May 19, 1967 at 9:30 A.M. Defendant may remain on the same bail.

Declaration of Melvin John Porter.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, vs. John Anthony Green, Defendant. No. A 101149.

State of California, County of Los Angeles—ss.

I, MELVIN JOHN PORTER, declare as follows:

That JOHN ANTHONY GREEN has never sold me any narcotics or had anything to do with narcotics; that on or about January 15, 1967 I told a person named "Lughead" that I thought I sold some narcotics to a police officer and I was told by "Lughead" that the police would compel me to name some person as my supplier, and if I informed on him (Lughead) that he would have friends who would know about it and he would have me disposed of;

The same day or the next day I told JOHN the same thing and told him that I was in trouble and wanted him to help me; I asked JOHN to meet this Mr. Dominguez and try to find out if he was a police officer; it was my idea for JOHN to offer the man a Coke with some aspirin and offer to sell him some marijuana; that I told JOHN to get some aspirin to put in the Coke; that after JOHN had this conversation with the man he came over and told me that he thought the man was a police officer and advised me to turn myself in and make a full breast of my involvement; in fact, he insisted so strongly that when I was arrested I thought that JOHN had turned me in.

Later, when I was arrested and was in custody, the police kept telling me that they knew it was JOHN

GREEN I was involved with and that unless I implicated him that they would see that I was out of circulation for a long time; that I have made several statements about JOHN GREEN in the past because of numerous reasons, e.g. Fear of Threats; and inability to distinguish between reality and fantasy.

I am making this declaration upon the advice of my probation officer whom I contacted after JOHN GREEN was convicted; I regret having caused all this trouble for JOHN as I know he has always tried to advise me like an older brother or a father, and has always tried to help me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of May, at Sherman Oaks, California, 1967.

/s/ MEL PORTER
MEL JOHN PORTER

3

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 71 Present Hon. PRENTISS MOORE Judge
MAY 19 1967 19 APPEARANCES:

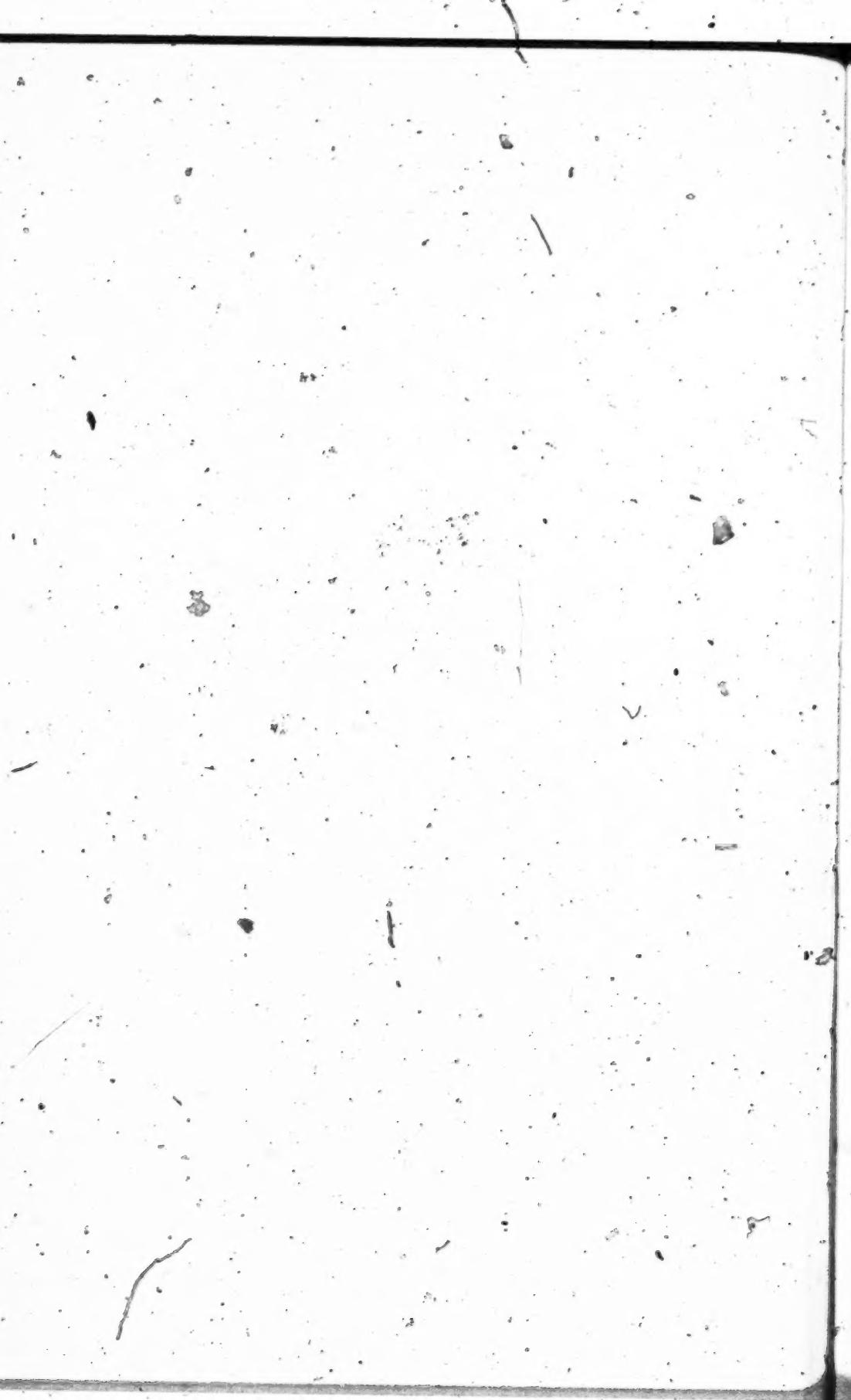
(Parties and Counsel checked if present.
Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by
J. Ideman Deputy
vs
JOHN ANTHONY GREEN

Terrance W Cooney
Motion for a new trial is denied.

E.J. Hovden, Public Defender, by
Deputy

- Proceedings suspended. Probation granted for Five Years
 Spend first 1 year in County Jail. Road Camp or Honor Farm Recommended.
 Good time allowed if earned.
- Pay fine of \$ 5, through Probation Officer in such manner as such officer shall prescribe.
- Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.
- Pay any judgment arising out of this matter, when it becomes final, in such amounts and manner as Probation Officer shall prescribe.
- Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.
- Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.
- Not associate with known narcotic users or sellers.
- Submit to periodic anti-narcotic tests as directed by the Probation Officer.
- Have no blank checks in possession; not write any portion of any checks, not have bank account upon which may draw checks.
- Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.
- Not associate with Terrence W Cooney.
- Stay out of places where homosexuals congregate.
- Not associate with children under 14 years except in presence of responsible adults.
- Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.
- Seek and maintain employment as approved by Probation Officer.
- Support dependents, as directed by Probation Officer.
- Maintain residence as approved by Probation Officer.
- Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.
- Obey all laws, orders, rules and regulations of Probation Department and of the Court.
- Motions for stay of execution and to fix bail on appeal are denied.**
A notice of appeal is filed. Motions for rehearing motions to fix bail on appeal and for a stay of execution is set for May 26, 1967, 9:30 A.M.



Notice of Appeal.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, vs. John Anthony Green, Defendant. No. A 101 149.

TO THE CLERK OF THE ABOVE COURT, AND TO THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY, AND TO THE PEOPLE OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that the defendant, JOHN ANTHONY GREEN, does appeal to the District Court of Appeal, Second Appellate District, County of Los Angeles, State of California, from the Judgment and Sentence entered in this action against the defendant.

Dated: May 19, 1967.

COONEY & COONEY

Attorneys for Defendant

/s/ By Terrence W. Cooney

Terrence W. Cooney

OPINION OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA.

In the Supreme Court of the State of California,
in Bank.

The People, Plaintiff and Respondent, v. John Anthony Green, Defendant and Appellant. Crim. 12753.

Filed March 21, 1969.

Defendant John Anthony Green was convicted of violating Health and Safety Code section 11532 (furnishing a narcotic to a minor) upon evidence consisting chiefly of the testimony and prior inconsistent statements of the minor to whom defendant allegedly furnished narcotics. Defendant challenges the constitutionality of Evidence Code section 1235, which provides for admission of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, as applied to testimony elicited at a preliminary hearing. On the basis of recent decisions of this court and the United States Supreme Court, we conclude that section 1235 as so applied is unconstitutional and therefore the conviction must be reversed.

After a preliminary hearing, defendant was charged with furnishing marijuana to one Melvin Porter, a minor. He was tried and convicted by a court sitting without a jury. The chief witness for the prosecution was young Porter, who was markedly evasive and uncooperative on the stand. He testified that defendant had telephone him in January 1967 and asked him to sell some unidentified "stuff." He admitted he had obtained 29 plastic "baggies" of marijuana, some of which he sold and the rest of which was purportedly stolen from him. He testified that he was uncertain how he

obtained the marijuana, primarily because he was on "acid" (LSD) at the time and could not then distinguish fact from fantasy. At various points Porter was impeached by the prosecution by the use of his testimony at the preliminary hearing, in which he had stated that defendant had specifically asked him to sell marijuana and that he obtained the marijuana from the yard of defendant's parents' home, at the behest and direction of defendant. This preliminary hearing testimony was admitted as a prior inconsistent statement under section 1235 of the Evidence Code.¹

Following the deputy district attorney's reading of the preliminary transcript, Porter testified that his testimony at that hearing was the truth as he then believed it, and that his memory was now refreshed and he "guessed" he had obtained the marijuana from defendant's parents' yard and had given the money from its sale to defendant. However, on cross-examination Porter conceded that in fact it was his memory not of the events themselves but of the preliminary testimony which was refreshed, and he was still unsure and had no present recollection of the actual episode.

Later in the trial still another version of Porter's story was offered and admitted. Officer Wade testified that Porter had told him during a conversation at Juvenile Division headquarters that defendant came to Porter's house and personally delivered the marijuana to him. This statement was also admitted under Evidence Code section 1235 as a prior inconsistent statement. Like the preliminary hearing testimony, it was

¹We assume for purposes of discussion that the preliminary hearing testimony was in fact "inconsistent" with the witness' testimony at trial.

admitted for the purpose of proving the truth of the matter stated therein, as then sanctioned by the code.

Only one other item of evidence appeared to link defendant with Porter: the testimony of Officer Dominguez, an undercover officer, that he attempted to buy narcotics from Porter, who told him he would have a supplier named "John" contact him. In fact, defendant contacted Dominguez and purported to be a narcotics supplier; but when defendant insisted that Dominguez take narcotics with him to show good faith, the sale fell through. Defendant admitted the incident but explained that Porter asked him and he agreed to help expose a suspected undercover officer by a bogus sale. Defendant denied ever being in possession of narcotics. No charges were ever filed in connection with this purported transaction, and the trial court carefully limited its admission to the narrow purpose of showing that "Porter and the defendant had previous associations and were acquainted."

Defendant contends that the admission of the prior inconsistent statements of Porter as evidence of the truth of the matters stated therein—as opposed to admission for impeachment only—was unconstitutional and contrary to our recent holding in *People v. Johnson* (1968) 68 Cal.2d 646 (cert. denied 1969, 37 U.S.L. Week 3259), and that its admission constituted prejudicial error under the standards of *Chapman v. California* (1967) 386 U.S. 18. The People concede that the testimony of Officer Wade was inadmissible under *Johnson*, but assert that this error was not prejudicial.²

²There is no question but that both prior statements were offered, admitted, and considered as evidence of the facts stated therein. We cannot accept the tardy view propounded in the

As for the preliminary hearing testimony, the People urge that *Johnson* does not or should not preclude its evidentiary use since defendant had an opportunity to cross-examine the declarant Porter at the time the statement was made. This rationalization is not persuasive.

In *Johnson* we held that Evidence Code section 1235, insofar as it provides for admission of prior inconsistent statements as evidence of the truth of the matters stated therein, is unconstitutional when applied to testimony before a grand jury without the presence of the defendant, his counsel, or the ultimate trier of fact. As a consequence *Johnson* returned California law in this area to the general common law rule which prevailed prior to passage of the Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes. Our decision was impelled by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer v. Texas*,

People's supplementary brief that the court did not rely upon this evidence, and in fact considered only the abortive transaction between defendant and Officer Dominguez as proof of defendant's guilt. In addition to his references to section 1235 at the time of admission, the deputy district attorney urged during closing argument that both these prior statements be considered "as much evidence . . . as if [Porter] said it from the witness stand. . . ." Moreover, we must take note of both the trial court's specific limitation, referred to earlier, of Officer Dominguez' testimony to showing that defendant and Porter were "acquainted," and the fact that the People in their opening brief rely heavily on Porter's statements in supporting the sufficiency of the evidence and specifically assert that the court "nowhere states that it did not believe that portion of Porter's testimony which . . . is sufficient to support the judgment." According to the People, "The trial court simply found that for all of Porter's obstinate evasiveness on the stand, the fact of appellant's furnishing stood clear in his mind." We read the trial court's opinion in accord with this latter statement,

(1969) 380 U.S. 400; *Barber v. Page* (1968) 390 U.S. 719.)

The complaining witnesses in *Johnson* had testified before the grand jury to acts of incest by the defendant. However, at trial these witnesses changed their stories and denied the truth of their prior testimony, claiming they had fabricated the incest charge out of spite. The grand jury testimony was admitted under Evidence Code section 1235, and on the basis of that evidence the defendant was convicted. We reversed, declaring that such evidentiary use of the grand jury testimony was in violation of the confrontation clause of the Constitution. In response to the People's contention that the witnesses could be cross-examined at trial, we stated: "To assert that the dangers of hearsay are 'largely nonexistent' when the declarant can be cross-examined at some later date, or to urge that such cross-examination puts the later trier of fact in 'as good a position' to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination." (Italics in original.) (*People v. Johnson* (1968) *supra*, 68 Cal.2d 646, 655.) Belated cross-examination before the trial court, such as was available to defendant in the instant case, is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal.

We recognize that the case before us differs from *Johnson* in a significant respect. Here, unlike *Johnson*, defendant had an opportunity to cross-examine the witness at the time the prior inconsistent statements

were made, i.e., at the preliminary hearing. This, assert the People, is a constitutionally adequate fulfillment of the right of confrontation. However, their contention overlooks the thrust of our opinion in *Johnson* and the realities of the preliminary hearing system, and directly conflicts with the recent stance of the United States Supreme Court.

Barber v. Page (1968) 390 U.S. 719, cited and relied upon in *Johnson*, involved the "unavailable witness" exception to the hearsay rule. A key witness who had testified at a preliminary hearing was confined in prison elsewhere at the time of trial. The prosecution made little or no effort to compel his presence at the trial, and instead was allowed to read into evidence the transcript of his preliminary testimony. The defendant had not cross-examined the witness at the preliminary hearing, although a codefendant had done so. There was a close question whether the defendant had waived his right to cross-examine at the preliminary hearing, but the court found no waiver and in effect found no opportunity for cross-examination. Concluding that the prosecution had not made a sufficient effort to have the witness present, the court ruled that no unavailability—and hence no "necessity"—was demonstrated to justify the "prior testimony" hearsay exception and to overcome the defendant's right of confrontation.

However, the opinion in *Barber v. Page* did not stop at that point. Since the question of cross-examination and waiver was close, the court went on to make its position unequivocally clear regarding the value of cross-examination at a preliminary hearing in lieu of cross-

examination at trial. In language we substantially quoted in *Johnson* (68 Cal.2d at p. 659 fn. 9), the high court stated: "Moreover, we would reach the same result . . . had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies, the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case." (Italics added.) (*Barber v. Page* (1968) *supra*, 390 U.S. 719, 725-726.) This expression was more than a mere dictum, as the Supreme Court has since demonstrated. In *Berger v. California* (1969) U.S. [89 S.Ct. 540], the *Barber* "unavailable witness" rule was made retroactive and was specifically applied to a case in which there was an opportunity for cross-examination at the preliminary hearing when the prior testimony was taken.⁸

⁸See also recent California cases which, even without the prompting of *Berger*, have applied *Barber* despite the presence of preliminary hearing cross-examination. (E.g., *People v. Harris* (1968) 266 A.C.A. 444; *People v. Casarez* (1968) 263 A.C.A. 132 ["extensively cross-examined"]; cf. *People v. King* (1969) 269 A.C.A. 35 [witness actually unavailable]; *Mason v. United States* (10th Cir. 1969) F.2d [4 Cr.L.Rptr. 3099, 3100] [testimony unavailable].)

The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*: "These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand." (Italics in original) (People v. Johnson (1968) *supra*, 68 Cal.2d 646, 659, 660.) We reiterate that the "contemporaneous" cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc*.⁴

In the instant case the only direct testimony of prior statements put before the trial court charged with its evaluation in terms of defendant's guilt, came by means of the deputy district attorney's reading of the cold transcript of the preliminary hearing. That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact, and we find the process lacking in con-

⁴In *Berger v. California* (1969) *supra*, ..., U.S. ..., [89 S. Ct. 540, 541], the high court stated that *Barber* was "foreshadowed, if not preordained" by *Pointer v. Texas*. Similarly, it could be said that the instant case was "foreshadowed, if not preordained" by *People v. Johnson*. (See *People v. Vinson* (1969) 268 A.C.A. 728.)

stitutional validity. Even had Porter's preliminary hearing cross-examination been read to the trial court—and it was not—it could have been of limited use in assessing the value of the statements. It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States* (1894) 156 U.S. 237, 242-243.) It is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of the credibility of a witness and of the weight to be given his testimony.

Also lost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, Judge Leo R. Friedman has written (Essen-

⁶With one insignificant exception, Porter's preliminary cross-examination was not read to the court. Therefore, in this instance, the question of "contemporaneous" cross-examination, insofar as it concerned or even reached the ears of the ultimate trier of fact, is more academic than actual.

tials of Cross-Examination (Cont.Ed.Bar, 1968) p. 40) that while the lawyer "must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special circumstances." In addition, counsel may well conduct his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, states Friedman, counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." (*Id.* at, p. 48.)⁶ We conclude that experience demonstrates the essentiality of truly contemporaneous cross-examination.

But leaving aside for the moment questions of subjective evaluation by the trier of fact, the Supreme Court in *Barber* clearly recognized that there is a substantial difference in the nature and purposes of preliminary and trial proceedings, regardless of whether there has been cross-examination. *Barber* points out that

⁶Furthermore, we note that under the facts of the instant case, which are far from atypical, not only was Porter's preliminary hearing cross-examination not introduced, but cross-examination at trial regarding his prior statements would have proved futile. Porter asserted that his prior statements may have been what he believed at the time, but he now could not remember the events in question. Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.

the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial. The judge in preliminary proceedings is not required to be convinced of the defendant's guilt "beyond a reasonable doubt," but need only look for reasonable credibility in the charge against him.¹ *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity (see *Jennings v. Superior Court* (1967) 66 Cal.2d 867), neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 U.C.L.A. L. Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination.

¹Penal Code section 872 provides in relevant part: "If it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must [endorse the complaint]." "Sufficient cause" is "equivalent in meaning to 'reasonable and probable cause'" (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 283), and the evidence before the committing magistrate "need not be such as would require a conviction." (*People v. Nagle* (1944) 25 Cal.2d 216, 222.)

| Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause,⁸ would tend to develop into a full-scale trial. This would invite thorough and lengthly cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts of first instance.⁹

Although we recognize that some of the same practical difficulties exist, nothing we say here is intended to affect or cast doubt upon the viability or constitutionality of the long-established "prior testimony" exception to the hearsay rule. (Evid. Code, §§ 1290-1292.) This exception, as *Barber* points out, adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, out-

⁸"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.)

⁹Approximately 85 percent of felony proceedings in California superior courts originate in preliminary hearings. (Crime and Delinquency in Cal.: Report of Bureau of Criminal Statistics (1965) p. 66.) In the fiscal year of 1966-1967, this represented 64,308 felony preliminary filings in municipal courts and 7,256 in justice courts. (Annual Rep. of Judicial Council of Cal. (1968) pp. 107, 145.)

weigh the lack of contemporary cross-examination.¹⁰ Of course, no such "necessity" exists where the witness is present to testify at trial under oath, but for some disclosed or undisclosed reason does not relate the same version of events that he told previously and that a party anticipates he will tell.¹¹ This is strictly a question of *credibility*, to be dealt with, as has always been the case, by the use of immediate and contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statements for purposes of *impeachment*.

In summary, the rules that emerge from the cases and principles are these: cross-examination at trial relating to a statement or testimony given previously is constitutionally inadequate. (*Johnson*.) Cross-examination at the time of the statement, e.g., at a preliminary hearing, before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, is likewise constitutionally inadequate.

¹⁰Evidence Code section 1291 admits former testimony when the present defendant was a party to the hearing at which that testimony was taken "and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he had at the [present] hearing." Although preliminary hearing testimony was clearly contemplated by section 1291 (see comments thereto), the Supreme Court in *Pointer v. Texas* and *Barber v. Page* left open the question whether such prior testimony satisfies the confrontation clause of the Constitution, and we have no occasion to consider that question at this time. (But see *People v. King* (1969) *supra*, 269 A.C.A. 35, 42.)

¹¹"It is one thing to use prior testimony or out-of-court declarations under well formulated hearsay exceptions when the witness is dead, incompetent, or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive."

quate. (*Barber*.) A combination of these two negatives obviously cannot produce a positive. Therefore, cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before a different trier of fact, is not a valid substance for constitutionally adequate confrontation. The facts in the instant case compose that combination of negatives, compelling us to conclude that defendant was denied the right of confrontation guaranteed by the Sixth Amendment to the Constitution. Both prior statements by Porter should have been excluded for any purpose other than impeachment.

We pause to note, as we did in *Johnson* (68 Cal.2d at p. 658), that the Legislature was not unmindful of the likelihood that its overly broad approval of the use of hearsay in criminal cases would have constitutional implications. Thus it provided in Evidence Code section 1204: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation the hearsay is no longer reliable, and it is not the only evidence available." (People v. Vinson (1969) *supra*, 268 A.C.A. 728, 733.)

Since the two most damaging statements of the witness Porter are inadmissible as substantive evidence, and since we find no other substantial evidence of a narcotics transaction between Porter and defendant on the date charged, the prejudicial nature of the error is manifest (see fn. 1, *ante*), and the judgment of conviction must be reversed. (*Chapman v. California* (1967) *supra*, 386 U.S. 18.) We need not reach defendant's additional contentions of insufficiency of the evidence, suppression of evidence, and prejudicial misconduct.

The judgment is reversed.

Mosk, J.

We Concur:

Traynor, C. J.

McComb, J.

Peters, J.

Tobriner, J.

Burke, J.

Sullivan, J.

Supreme Court of the United States.

January 12, 1970

California v. John Anthony Green No. 387, October Term, 1969.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI.

"The motion of the respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted and the case is placed on the summary calendar."





SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
History of the Case	3
Factual Statement	4
Reasons for Granting the Writ	9

I

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial

9

II

The Confrontation Clause of the Sixth Amendment, as Construed by This Honorable Court in Barber and Other Recent Decisions, Does Not Prohibit the States or the Committee on Rules of Evidence of the Judicial Conference of the United States From Adopting Rules Admitting Prior Statements of a Witness Who Is Subject at Trial to Cross-Examination in Accord With Modern and Enlightened Authorities; a Compelling Necessity Requires the Grant of Certiorari to Give Authoritative Guidance to the States and in the Exercise of Supervisory Power Over the Federal Courts

15

Conclusion 21

INDEX TO APPENDICES

	Page
Appendix A. United States Constitution, Amendment VI	1
Appendix B. Opinion of the Supreme Court of the State of California	2
Appendix C. Opinion of the Court of Appeal	16

TABLE OF AUTHORITIES CITED

Cases	Page
Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255	2, 9, 10, 11
Di Carlo v. United States, 6 Fed. 2d 364, cert. denied, 268 U.S. 706	18, 19
Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934	11
Gelhaar v. State, 163 N.W. 2d 609	16
Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178	12
Harrington v. California, 37 U.S. Law Week 4472 ..	12
Jett v. Commonwealth, 436 S.W. 2d 788	16
Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 2d 489	12
Miranda v. Arizona (Stewart v. California), 384 U.S. 436	2
People v. Green, 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422	1
People v. Green, 265 A.C.A. 1, 71 Cal. Rptr. 100	1
People v. Johnson, 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, cert. denied 1969, 89 S. Ct. 679	13
Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923	2, 9, 10, 11
Rios-Ramirez v. United States, 403 Fed. 2d 1016, certiorari denied, 89 S. Ct. 1292	12
Santoro v. United States, 402 Fed. 2d 920	12
United States v. Armone, 363 Fed. 2d 385	18
United States v. De Sisto, 329 Fed. 2d 929, cert. denied, 377 U.S. 979	17
United States v. Schwartz, 252 F. Supp. 866	18

Rules	Page
Rules of the Supreme Court of the United States,	
Rule 22	2
The American Law Institute Model Code of Evidence, Rule 503(b)	16
Uniform Rules of Evidence, Rule 63(1)	16
 Statutes 	
California Evidence, Code, Sec. 711	9
California Evidence Code, Sec. 770	3, 5, 6
California Evidence Code, Sec. 1235	3, 5, 6, 9
.....10, 15, 17, 19	
California Health and Safety Code, Sec. 11532	3
California Penal Code, Sec. 686	9
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Sixth Amendment ..	2, 3
.....4, 9, 13, 20	
 Textbooks 	
Ladd, Impeachment Of One's Own Witnesses—New Developments, 4 U. Chi. L. Rev. (1936), p. 69	17
Maguire, Evidence, Common Sense and Common Law (1947), pp. 59-63	17
McCormick, On Evidence, Sec. 39, pp. 73-82	16
McCormick, The Turncoat Witness: Previous Statements As Substantive Evidence, 25 Texas Law Review (1947), p. 573	17
Morgan, The Hearsay Dangers and The Application of The Hearsay Concept, 62 Harv. L. Rev. 177 (1948), pp. 192-196	17
Morgan, The Law of Evidence, 1941-1945, 59 Harvard Law Review 481 (1946), pp. 545-555	17
3 Wigmore, Sec. 1018, pp. 687-688	17

IN THE
Supreme Court of the United States

October Term, 1968

No.

STATE OF CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

**Petition for Writ of Certiorari to the Supreme Court
of the State of California**

The State of California, requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on March 21, 1969.

Opinions Below

The opinion of the Court of Appeal rendered on August 16, 1968, and reported as *People v. Green*, 265 A.C.A. 1, 71 Cal. Rptr. 100, is set out as Appendix C. The granting of a hearing on October 9, 1968 by the California Supreme Court vacated that opinion. The opinion of the California Supreme Court reversing respondent's conviction, rendered on March 21, 1969, is reported as *People v. Green* (1969) 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422 and is set out in Appendix B.

Jurisdiction

The opinion of the California Supreme Court issued on March 21, 1969. On June 18, 1969, an order was entered extending the time for filing the petition for writ of certiorari to and including July 11, 1969 and, by further order, extended to July 25, 1969. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. section 1257(3), and Rule 22 of the Rules of the Supreme Court of the United States, since a right has been especially set up and claimed under the Constitution of the United States.¹

Questions Presented

1. Do the holdings of this Honorable Court in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 and *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?
2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal

¹Although the decision of a state appellate court reversing a judgment ordinarily remands the matter to the lower court for retrial, this Honorable Court recognized in *Miranda v. Arizona* (*Stewart v. California*), 384 U.S. 436, 497-498, that under California law in the event of an acquittal on retrial the state could not appeal and under such circumstances the decision of the California Supreme Court constituted a final judgment under 28 U.S.C. 1257(3).

authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination and scrutiny as to demeanor by the trier of fact?

Statutes Involved

The constitutional and statutory provisions are set forth in the Appendix A. They are:

United States Constitution, Sixth Amendment;
California Evidence Code sections 770 and 1235.

Statement

History of the Case

In an information filed by the District Attorney for the County of Los Angeles, respondent was accused of violating section 11532 of the California Health and Safety Code, furnishing, selling, and/or giving of a narcotic (marijuana) to a minor. (Cl. Tr. p. 1.²) Respondent entered a plea of not guilty and waived trial by jury. (Cl. Tr. pp. 2, 4.) He was found guilty, and his motion for a new trial was denied. Proceedings were suspended and respondent was granted probation for five years. One of the conditions of probation was that he serve one year in the county jail. He filed notice of appeal from the order granting probation. (Cl. Tr. pp. 9, 10.) Thereafter the Court of Appeal reversed the conviction on the ground that Evidence Code section 1235, which permitted the introduction of testimony given at a preliminary hearing for the truth of

²Cl. Tr. refers to the clerk's transcript of the proceedings in the Superior Court of the County of Los Angeles in and for the State of California. A certified copy of said transcript is filed with this court.

the matter asserted by a witness at the trial, was unconstitutional. (See Appendix C.) The petition of the People for a hearing on the constitutional issue in the California Supreme Court was granted, and following argument on the constitutional issue regarding the application of the confrontation clause of the Sixth Amendment, the California Supreme Court reversed the judgment on the ground that there was error of a constitutional dimension in the admission of such prior inconsistent statements and that this holding was "impelled" by decisions of this Honorable Court (See Appendix B). The decision of the California Supreme Court was rendered on March 31, 1969.

Factual Statement

In January of 1967, Melvin Porter, the minor to whom respondent was charged with furnishing the narcotic, was then age 16 years and had known the respondent for over four years. (Rep. Tr. pp. 11, 12.⁸)

Porter acknowledged having used LSD (acid) a number of times and had been using marijuana about two or two and a half months prior to his arrest in late January, 1967. (Rep. Tr. p. 13.) At the trial, he testified that shortly after New Year's 1967, the respondent Green had called Porter at Porter's home and told Porter that he had some "stuff" that he wanted Porter to sell. (Rep. Tr. pp. 13-15.) Porter at the trial testified that he did not recall whether Green brought something into the house on the day of the telephone call because he, Porter, was under the influence of LSD. (Rep. Tr. pp. 16, 17.)

⁸Rep. Tr. refers to the reporter's transcript of the proceedings had in the Superior Court below. A certified copy of this transcript is filed with the court.

At this point the People, pursuant to Evidence Code sections 1235 and 770, were permitted to impeach this testimony and to introduce for the truth of the matter asserted the testimony of Porter at the preliminary hearing in which Porter stated that respondent Green had told Porter in a conversation that he had a kilo of marijuana, that he was selling, and that marijuana came in 29 "baggies" in a large shopping bag. (Rep. Tr. pp. 19, 20.)

Porter at the trial stated that he could not recall how he had testified at the preliminary hearing, but that his testimony at that time was the truth as he believed it. (Rep. Tr. pp. 20-21.) At the trial Porter maintained that he could not recall how he came into possession of the marijuana but that he did come into possession of 29 "baggies." (Rep. Tr. pp. 25-26.) He sold a few of the baggies and the rest were stolen from his closet. (Rep. Tr. p. 27.) Among the sales Porter made of this marijuana was a sale to Officer Dominguez. (Rep. Tr. p. 28.) At the trial, Porter testified that someone told him where he could find the marijuana but that he was not certain who the person was or where the marijuana was found. (Rep. Tr. pp. 29-30.)

At this time, Porter was again impeached by the reading of his testimony on cross-examination at the preliminary hearing. At that hearing, Porter testified that respondent Green came into his home, told him that he had some "Grass" or marijuana to sell, and that Green told him that the marijuana could be found at Green's father's home. (Rep. Tr. pp. 31-36.)

At the trial, Porter testified that he was telling the truth at the time he testified at the preliminary, that he guessed that the reading of the questions and answers

refreshed his recollection. (Rep. Tr. pp. 23, 36.) Porter stated that of his own knowledge, with his recollection refreshed, he guessed he obtained the marijuana from the back yard of Green, and that Green told him where the marijuana could be found. Porter sold some of the marijuana and gave the proceeds to Green. (Rep. Tr. pp. 36-37.)

Officer Barry M. Wade, a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Division, had a conversation with Porter at the Juvenile Division Headquarters on January 31, 1967. Officer Wade testified that Porter was sober at that time. (Rep. Tr. p. 42.) Porter told Officer Wade that Green called him in the morning and stated that he had a kilo of marijuana and wanted to know if he (Green) could leave it at Porter's house. Green came to Porter's house later with a brown shopping bag containing 29 baggies of a green leafy substance which Porter recognized as being similar to marijuana. (Rep. Tr. pp. 56-57.) This conversation was introduced for the truth of the matter asserted pursuant to Evidence Code sections 1235 and 770. (Rep. Tr. p. 43.) It was stipulated at the trial that Porter said to Officer Wade that on previous occasions during the five months preceding his arrest Green brought large quantities of marijuana to Porter's home for storage and that Porter used a portion of this and paid Green therefor; that Porter sold marijuana to buyers who came to his home from the marijuana stored by Green and turned the money over to Green. (Rep. Tr. pp. 105-106.)

Officer Ramon Dominguez, during January of 1967, was acting as an undercover officer attempting to purchase marijuana from narcotic sellers. During this period he purchased marijuana from Porter. (Rep. Tr. p. 62a.) Officer Dominguez's testimony as to an appointment with Green was limited to the purpose of showing that Green and Porter had previous associations and were acquainted. (Rep. Tr. pp. 67-76.)

As part of the defendant's case, the witness Porter was called for further cross-examination. Porter testified that he had set up an appointment between Dominguez and Green. (Rep. Tr. p. 81.) He testified that he had talked to Officer Wade about buying some narcotics from Green and that he might have said Green wanted to store it at his home. (Rep. Tr. p. 83.) He testified that in January, 1967, he had told a Mr. Blackmore that he was going to get even with Green for repossessing a car which Green had sold him. (Rep. Tr. p. 85.)

On cross-examination, Porter testified at the trial that Green wanted to sell Officer Dominguez \$500 worth of peat moss if Dominguez wanted "grass" or baking soda if he wanted "acid." (Rep. Tr. p. 81.) On redirect examination, Porter admitted that Green brought over marijuana on different occasions. (Rep. Tr. p. 86.)

Green testified on his own behalf at the trial, stating that he had sold a car to Porter in 1966 which Porter failed to pay for and which he had repossessed. (Rep. Tr. pp. 107-108.)

Green testified that Porter called him in January and said that he thought he had sold marijuana to a police officer and asked Green to talk to the suspected officer to determine whether he was in fact an undercover agent. Porter gave him (Green) the idea that he should attempt to sell the officer \$500 worth of peat moss. Green testified that as a result of his conversation he (Green) called Officer Dominguez and at Porter's request arranged a meeting at the hot dog stand where the conversation to which Officer Dominguez had testified took place. Green testified that he had put aspirin in the coke because he assumed that an officer would not consume narcotics. (Rep. Tr. pp. 108-110.) Green denied that he sold marijuana to Porter, stating that on several occasions Porter had offered marijuana to smoke but that he had refused. He said that he was familiar with the going price of narcotics because he had heard persons talk about it. (Rep. Tr. pp. 128-129.)

9

REASONS FOR GRANTING THE WRIT

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial

The petitioner contends that the California Supreme Court has misinterpreted the holdings⁴ of this Honorable Court articulating the scope of the Right of Confrontation contained in the Sixth Amendment and that the California Court has improperly held unconstitutional California Evidence Code section 1235.⁵

The Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d, 923, provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.⁶ *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, held that the right of confrontation includes both the opportunity to cross-examine and the occasion for the jury (trier of fact)

⁴California Evidence Code section 1235 provides:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (See Appendix A.)

⁵The California Constitution has no similar provision. See California Penal Code section 686, California Evidence Code 711.

to weigh the demeanor of the witness. The California Supreme Court, relying upon the above authorities, has held that this Honorable Court does not permit the introduction of prior inconsistent statements of a witness made at a preliminary hearing because of the limitations upon the states imposed by the confrontation clause. The People of the State of California, petitioner herein, respectfully submit that this Honorable Court has *not* so interpreted the confrontation clause as to limit the power of the State Legislatures in enacting legislation permitting the admission of prior statements at trial of a witness who is available for cross-examination and whose demeanor is subject to the scrutiny of the trier of fact.

In the instant case, the witness Porter confronted the defendant Green at trial, was subject to cross-examination and his demeanor in testifying was subject to the scrutiny of the trial judge who was the trier of fact; in fact he was available and was called for further cross-examination during the defendant's case-in-chief. The prior testimony introduced as an inconsistent statement pursuant to California Evidence Code Section 1235 was given at a preliminary hearing, at which hearing the defendant Green was also confronted by the witness Porter and through his counsel was afforded full opportunity to cross-examine the witness under oath.

The People of the State of California submit that the California Supreme Court has misinterpreted the holdings of this Honorable Court in *Pointer v. Texas*, *supra*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, and *Barber v. Page*, *supra*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, and that this court has

not held that the prior statement of a witness available at trial for cross-examination and confrontation is inadmissible because of the provisions of the United States Constitution.

In *Pointer v. Texas*, *supra*, the witness who had testified at the preliminary hearing was not available at the trial for confrontation and cross-examination, and in that case the defendant, because of lack of counsel at the preliminary hearing, was denied the meaningful cross-examination by counsel required by the confrontation clause of the United States Constitution.

In *Barber v. Page*, *supra*, likewise, the declarant did not confront the defendant at the trial and no effort had been made to procure his presence for confrontation and cross-examination at the trial prior to the introduction of the testimony taken at the earlier hearing. Accordingly, this Honorable Court held that there had been a denial of confrontation.

In *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, this Honorable Court made it clear that it is the right of cross-examination that is a primary interest secured by the Confrontation Clause and that the clause was to prevent depositions and ex parte affidavits being used in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing his recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge of his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

See also: *Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 2d 489.

As was implicit in this Honorable Court's holding in *Harrington v. California*, 37 U.S. Law Week 4472, decided June 3, 1969, where the declarant was present in court and testified and was subject to cross-examination by counsel for the defendant, no denial of the right of confrontation was presented. This had been the holding in the Court of Appeal, Ninth Circuit, prior to the decision in *Harrington*. See: *Rios-Ramirez v. United States*, 403 Fed. 2d 1016, 1017, certiorari denied April 1, 1969, 89 S. Ct. 1292; *Santoro v. United States*, 402 Fed. 2d 920, 922-923 (9th Cir. 1968).

Likewise this court has recognized the rule admitting prior identification as substantive evidence similar to the rule on a prior communication of a witness who is available for cross-examination at trial.

Gilbert v. California, 388 U.S. 263, 272 (Footnote 3), 87 S. Ct. 1951, 18 L. Ed. 2d 1178.

The California Supreme Court attributed its holding in the instant case to recent rulings of this Honorable Court. In the opinion below the Court said, at page 701, 70 A.C.:

“ . . . Our decision was *impelled* by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer v. Texas* (1965) 380 U.S. 400; *Barber v. Page* (1968) 390 U.S. 719.)”
(Emphasis added.)

Despite the decisions to which reference is made herein, the California Supreme Court said that this Honorable Court has held that the opportunity for cross-examination before the ultimate trier of fact was not satisfaction of the "contemporaneous" confrontation mandate of the Sixth Amendment because it was "not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal." In explanation of this interpretation the California Court said (70 A.C. at 703-704):

"The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*.⁶ These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, *i.e.*, before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand. (Italics in original.) (*People v. Johnson* (1968), *supra*, 68 Cal. 2d 646, 659, 660.) We reiterate that the 'contemporaneous' cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on

⁶*People v. Johnson* (1968), 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, cert. denied 1969, 89 S. Ct. 679. The California Supreme Court recognized that *Johnson* differed in a significant respect. In *Johnson*, a proceeding by indictment, the accused did not have the confrontation afforded in the instant case at the earlier hearing.

the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc.*" (Footnote omitted.)

Petitioner herein contends that this Honorable Court has *not* held that admission for the truth of the matters asserted of prior statements of a witness at the trial who testifies and is subject to cross-examination violates the Confrontation Clause or "impels" holding unconstitutional a state statute permitting the admission of such evidence. As will be briefly noted *infra*, II, respected and forward-looking authorities has proposed such a rule from a practical and astute appreciation of the problem of achieving a more enlightened and realistic ascertainment of the truth while preserving fundamental and essential safeguards.

In the instant case the means of testing the veracity of the witness was achieved and the right of confrontation was assured the accused both at the preliminary hearing *and* at the trial.

There was no denial of the Right of Confrontation and the California Court was wrong in its interpretation of the holdings of this Court. It is urged that the need for an authoritative decision from this Honorable Court on the subject is demonstrated.

II

**The Confrontation Clause of the Sixth Amendment,
as Construed by This Honorable Court in Bar-
ber and Other Recent Decisions, Does Not Pro-
hibit the States or the Committee on Rules of
Evidence of the Judicial Conference of the
United States' From Adopting Rules Admitting
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pelling Necessity Requires the Grant of Cer-
tiorari to Give Authoritative Guidance to the
States and in the Exercise of Supervisory Power
Over the Federal Courts**

The State of California, petitioner herein, contends that the misinterpretation of this Honorable Court's holdings on the scope of the Confrontation Clause by the California Supreme Court may prevent admission in evidence of relevant prior statements of witnesses at the trial, as well as precluding admission in evidence of past recollection recorded and other exceptions to the hearsay rule; that such a misinterpretation could prevent adoption of enlightened and progressive legislation and rules of evidence by the various states and by the Federal Courts. Eminent authorities have recognized the worth of the rule of evidence enacted in California Evidence Code section 1235 in the ascertainment of the truth at trial, and a brief discussion thereof will be made.

¹See discussion *infra*, in regard to the Proposed Rules of Evidence for the Federal District Courts and Magistrates.

The American Law Institute Model Code of Evidence Rule 503(b) permits admission in evidence of hearsay declarations if the judge finds that the declarant is present in court and subject to cross-examination.

Rule 63(1) of the Uniform Rules of Evidence provides for the admissibility of previous statements made by a person who is present at the hearing and is available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness. The commissioners of the Uniform Code comment that this adopts the American Law Institute Model Code of Evidence and note that this rule has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross-examination were not impaired and that court decisions have admitted evidence of prior inconsistent statements for its full value not limited merely to impeachment. The commissioners further note that when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

The Court of Appeal in Kentucky in a recent decision, *Jett v. Commonwealth*, reported in 436 S.W. 2nd 788, at 792, refers to the direct and sensible approach set forth in the Model Code of Evidence and the Uniform Rules of Evidence.

See also: *Gelhaar v. State* (Wis., 1969), 163 N.W. 2d 609, 612-614.

Professor McCormick in his work on Evidence, section 39, pp. 73-82, presents compelling arguments in

support of the rule codified in California Evidence Code section 1235. Among the many advantages of such a rule he notes that it effectively deals with the "turn-coat witness" and permits introduction of the more reliable earlier statements since they are made nearer in time to the event related. He points out that the important requirement of confrontation, cross-examination, is present and that this is the most essential safeguard.

Wigmore, who first approved the orthodox view on the subject, has in the latest edition concluded that the natural and correct solution is to admit prior inconsistent statements as having affirmative testimonial value when the witness is present and subject to cross-examination.

III Wigmore, section 1018, pp. 687-688.

See also Ladd, *Impeachment Of One's Own Witnesses — New Developments*, 4 U. Chi. L. Rev. 69 (1936); Maguire, *Evidence; Common Sense and Common Law*, at pages 59-63 (1947); McCormick, *The Turncoat Witness: Previous Statements As Substantive Evidence*, 25 Texas L. Rev. 573 (1947); Morgan, *The Hearsay Dangers and The Application of The Hearsay Concept*, 62 Harv. L. Rev. 177 (1948) at 192-196; Morgan, *The Law of Evidence*, 1941-1945, 59 Harv. L. Rev. 481 (1946), at 545-555.

The Second Circuit Court of Appeals, speaking through Judge Friendly in *United States v. De Sisto* (1964), 329 Fed. 2d 929, cert. denied, 377 U.S. 979, gave substantive effect to a prior identification of the accused to supply an element in support of a jury verdict. Squarely faced with the question of the evidentiary

status of prior inconsistent statements, the court well stated the position of petitioner at page 933:

"The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachronism 'that still impede(s) our pursuit of the truth.' [Citations omitted.] The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75-76 (1954). . . ."

See also United States v. Armone (2nd Cir. 1966), 363 Fed. 2d 385 [De Sisto followed]; *United States v. Schwartz* (E.D. Pa. 1966), 252 F. Supp. 866, and also Judge Learned Hand's discussion in *Di Carlo v.*

United States (1925), 6 Fed. 2d 364, *cert. denied*, 268 U.S. 706, espousing the principles later adopted in California Evidence Code section 1235.

In March of 1969, the Advisory Committee on Rules of Evidence presented to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates. These rules would admit the evidence that the California Supreme Court has held inadmissible under the holdings of this Honorable Court. It is petitioner's contention that the exercise of the supervisory power over the Federal Judiciary presents another compelling reason for the grant of the petition in this case.

In discussing the proposed rules the Advisory Committee said (46 F.R.D. 161, 336-337):

"Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be

influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.' Comment, California Evidence Code § 1235. See also McCormick § 39.

The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. Repr., 599, 441 P. 2d 111 (1968). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements."

The need for a declaration on this important question by this Honorable Court is evident. The final arbiter of the scope of the commands of the Federal Constitution on the states and Federal Courts is this Court.

The California Supreme Court has said the result reached by it in the instant case was "impelled" by the decisions of this Court interpreting the Confrontation Clause of the Sixth Amendment. If this is incorrect,

but permitted to stand as an interpretation of this Court's holdings on the question, the Committee on Evidence for the Federal Courts may be deterred from fully considering this sensible and enlightened rule of the modern progressive authorities. If the California Court is right, the authorities heretofore cited to the contrary, this Court should also speak on the matter to properly supervise the proceedings that may occur in the Federal Courts in event of the adoption of this rule.

This Honorable Court has recognized and has consistently refused to abdicate its obligation, particularly in the exercise of supervisory power over the Federal Courts, to decide questions involving Federal Constitutional issues in order that the lower Federal Courts and the Courts of the various states may conform their behavior to the commands of the Constitution.

It is respectfully submitted that a hearing is required in this Honorable Court in order that guidance may be given to the state and Federal Courts and it is requested that the petition for certiorari be granted.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. LYNCH,
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APPENDIX 'A'

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. [sic.]"

California Evidence Code section 770

§770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code section 1235

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1956, c. 299, § 1235.)

APPENDIX B

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California,
in Bank.

The People, Plaintiff and Respondent, v. John Anthony Green, Defendant and Appellant. Crim. 12753.

Filed March 2, 1969.

Defendant John Anthony Green was convicted of violating Health and Safety Code section 11532 (furnishing a narcotic to a minor) upon evidence consisting chiefly of the testimony and prior inconsistent statements of the minor to whom defendant allegedly furnished narcotics. Defendant challenges the constitutionality of Evidence Code section 1235, which provides for admission of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, as applied to testimony elicited at a preliminary hearing. On the basis of recent decisions of this court and the United States Supreme Court, we conclude that section 1235 as so applied is unconstitutional and therefore the conviction must be reversed.

After a preliminary hearing, defendant was charged with furnishing marijuana to one Melvin Porter, a minor. He was tried and convicted by a court sitting without a jury. The chief witness for the prosecution was young Porter, who was markedly evasive and uncooperative on the stand. He testified that defendant had telephoned him in January 1967 and asked him to sell some unidentified "stuff." He admitted he had obtained 29 plastic "baggies" of marijuana, some of which he sold and the rest of which was purportedly

stolen from him. He testified that he was uncertain how he obtained the marijuana, primarily because he was on "acid" (LSD) at the time and could not then distinguish fact from fantasy. At various points Porter was impeached by the prosecution by the use of his testimony at the preliminary hearing, in which he had stated that defendant had specifically asked him to sell marijuana and that he obtained the marijuana from the yard of defendant's parents' home, at the behest and direction of defendant. This preliminary hearing testimony was admitted as a prior inconsistent statement under section 1235 of the Evidence Code.¹

Following the deputy district attorney's reading of the preliminary transcript, Porter testified that his testimony at that hearing was the truth as he then believed it, and that his memory was now refreshed and he "guessed" he had obtained the marijuana from defendant's parents' yard and had given the money from its sale to defendant. However, on cross-examination Porter conceded that in fact it was his memory not of the events themselves but of the preliminary testimony which was refreshed, and he was still unsure and had no present recollection of the actual episode.

Later in the trial still another version of Porter's story was offered and admitted. Officer Wade testified that Porter had told him during a conversation at Juvenile Division headquarters that defendant came to Porter's house and personally delivered the marijuana to him. This statement was also admitted under Evidence Code section 1235 as a prior inconsistent state-

¹We assume for purposes of discussion that the preliminary hearing testimony was in fact "inconsistent" with the witness' testimony at trial.

ment. Like the preliminary hearing testimony, it was admitted for the purpose of proving the truth of the matter stated therein, as then sanctioned by the code.

Only one other item of evidence appeared to link defendant with Porter: the testimony of Officer Dominguez, an undercover officer, that he attempted to buy narcotics from Porter, who told him he would have a supplier named "John" contact him. In fact, defendant contacted Dominguez and purported to be a narcotics supplier; but when defendant insisted that Dominguez take narcotics with him to show good faith, the sale fell through. Defendant admitted the incident but explained that Porter asked him and he agreed to help expose a suspected undercover officer by a bogus sale. Defendant denied ever being in possession of narcotics. No charges were ever filed in connection with this purported transaction, and the trial court carefully limited its admission to the narrow purpose of showing that "Porter and the defendant had previous associations and were acquainted."

Defendant contends that the admission of the prior inconsistent statements of Porter as evidence of the truth of the matters stated therein—as opposed to admission for impeachment only—was unconstitutional and contrary to our recent holding in *People v. Johnson* (1968) 68 Cal.2d 646 (cert. denied 1969, 37 U.S.L. Week 3259), and that its admission constituted prejudicial error under the standards of *Chapman v. California* (1967) 386 U.S. 18. The People concede that the testimony of Officer Wade was inadmissible under *Johnson*, but assert that this error was not prejudicial.²

²There is no question but that both prior statements were offered, admitted, and considered as evidence of the facts stated

As for the preliminary hearing testimony, the People urge that *Johnson* does not or should not preclude its evidentiary use since defendant had an opportunity to cross-examine the declarant Porter at the time the statement was made. This rationalization is not persuasive.

In *Johnson* we held that Evidence Code section 1235, insofar as it provides for admission of prior inconsistent statements as evidence of the truth of the matters stated therein, is unconstitutional when applied to testimony before a grand jury without the presence of the defendant, his counsel, or the ultimate trier of fact. As a consequence *Johnson* returned California law in this area to the general common law rule which prevailed prior to passage of the Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes. Our decision was impelled by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer v. Texas* (1965) 380 U.S. 400; *Barber v. Page* (1968) 390 U.S. 719.)

therein. We cannot accept the tardy view propounded in the People's supplementary brief that the court did not rely upon this evidence, and in fact considered only the abortive transaction between defendant and Officer Dominguez as proof of defendant's guilt. In addition to his references to section 1235 at the time of admission, the deputy district attorney urged during closing argument that both these prior statements be considered "as much evidence . . . as if [Porter] said it from the witness stand. . . ." Moreover, we must take note of both the trial court's specific limitation, referred to earlier, of Officer Dominguez' testimony to showing that defendant and Porter were "acquainted," and the fact that the People in their opening brief rely heavily on Porter's statements in supporting the sufficiency of the evidence and specifically assert that the court "nowhere states that it did not believe that portion of Porter's testimony which . . . is sufficient to support the judgment." According to the People, "The trial court simply found that for all of Porter's obstinate evasiveness on the stand, the fact of appellant's furnishing stood clear in his mind." We read the trial court's opinion in accord with this latter statement.

The complaining witnesses in *Johnson* had testified before the grand jury to acts of incest by the defendant. However, at trial these witnesses changed their stories and denied the truth of their prior testimony, claiming they had fabricated the incest charge out of spite. The grand jury testimony was admitted under Evidence Code section 1235, and on the basis of that evidence the defendant was convicted. We reversed, declaring that such evidentiary use of the grand jury testimony was in violation of the confrontation clause of the Constitution. In response to the People's contention that the witnesses could be cross-examined at trial, we stated: "To assert that the dangers of hearsay are 'largely nonexistent' when the declarant can be cross-examined at some later date, or to urge that such cross-examination puts the later trier of fact in 'as good a position' to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination." (Italics in original.) (People v. *Johnson* (1968) *supra*, 68 Cal.2d 646, 655.) Belated cross-examination before the trial court, such as was available to defendant in the instant case, is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal.

We recognize that the case before us differs from *Johnson* in a significant respect. Here, unlike *Johnson*, defendant had an opportunity to cross-examine the witness at the time the prior inconsistent statements were made, i.e., at the preliminary hearing. This, assert the People, is a constitutionally adequate fulfillment of the right of confrontation. However, their contention over-

looks the thrust of our opinion in *Johnson* and the realities of the preliminary hearing system, and directly conflicts with the recent stance of the United States Supreme Court.

Barber v. Page (1968) 390 U.S. 719, cited and relied upon in *Johnson*, involved the "unavailable witness" exception to the hearsay rule. A key witness who had testified at a preliminary hearing was confined in prison elsewhere at the time of trial. The prosecution made little or no effort to compel his presence at the trial, and instead was allowed to read into evidence the transcript of his preliminary testimony. The defendant had not cross-examined the witness at the preliminary hearing, although a codefendant had done so. There was a close question whether the defendant had waived his right to cross-examine at the preliminary hearing, but the court found no waiver and in effect found no opportunity for cross-examination. Concluding that the prosecution had not made a sufficient effort to have the witness present, the court ruled that no unavailability—and hence no "necessity"—was demonstrated to justify the "prior testimony" hearsay exception and to overcome the defendant's right of confrontation.

However, the opinion in *Barber v. Page* did not stop at that point. Since the question of cross-examination and waiver was close, the court went on to make its position unequivocally clear regarding the value of cross-examination at a preliminary hearing in lieu of cross-examination at trial. In language we substantially quoted in *Johnson* (68 Cal.2d at p. 659 fn. 9), the high court stated: "Moreover, we would reach the same result . . . had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The

right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case." (Italics added.) (Barber v. Page (1968) *supra*, 390 U.S. 719, 725-726.) This expression was more than a mere dictum, as the Supreme Court has since demonstrated. In Berger v. California (1969) U.S. [89 S.Ct. 540], the *Barber* "unavailable witness" rule was made retroactive and was specifically applied to a case in which there was an opportunity for cross-examination at the preliminary hearing when the prior testimony was taken.⁸

The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*: "These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a contemporaneous trier of fact, i.e., before the same trier who sits in judgment on the truth

⁸See also recent California cases which, even without the prompting of *Berger*, have applied *Barber* despite the presence of preliminary hearing cross-examination. (E.g., People v. Harris (1968) 266 A.C.A. 444; People v. Casarez (1968) 263 A.C.A. 132 ["extensively cross-examined"]); cf. People v. King (1969) 269 A.C.A. 35 [witness actually unavailable]; Mason v. United States (10th Cir. 1969) F.2d [4 Cr.L.Rptr. 3099, 3100] [testimony unavailable].)

of the witness' direct testimony as it is spoken from the stand." (Italics in original.) (People v. Johnson (1968) *supra*, 68 Cal.2d 646, 659, 660.) We reiterate that the "contemporaneous" cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc*.⁴

In the instant case the only direct testimony of prior statements put before the trial court charged with its evaluation in terms of defendant's guilt, came by means of the deputy district attorney's reading of the cold transcript of the preliminary hearing. That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact, and we find the process lacking in constitutional validity. Even had Porter's preliminary hearing cross-examination been read to the trial court—and it was not⁵—it could have been of limited use in

⁴In Berger v. California (1969) *supra*, ..., U.S. ..., [89 S. Ct. 540, 541], the high court stated that *Barber* was "foreshadowed, if not preordained" by *Pointer v. Texas*. Similarly, it could be said that the instant case was "foreshadowed, if not preordained" by *People v. Johnson*. (See People v. Vinson (1969) 268 A.C.A. 728.)

⁵With one insignificant exception, Porter's preliminary cross-examination was not read to the court. Therefore, in this instance the question of "contemporaneous" cross-examination, insofar as it concerned or even reached the ears of the ultimate trier of fact, is more academic than actual.

assessing the value of the statements. It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Mattox v. United States (1894) 156 U.S. 237, 242-243.) It is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of the credibility of a witness and of the weight to be given his testimony.

Also lost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, Judge Leo R. Friedman has written (*Essentials of Cross-Examination* (Cont.Ed.Bar, 1968) p. 40) that while the lawyer "must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special

circumstances." In addition, counsel may well conduct his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, states Friedman, counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." (*Id.* at p. 48.)⁶ We conclude that experience demonstrates the esentiality of truly contemporaneous cross-examination.

But leaving aside for the moment questions of subjective evaluation by the trier of fact, the Supreme Court in *Barber* clearly recognized that there is a substantial difference in the nature and purposes of preliminary and trial proceedings, regardless of whether there has been cross-examination. *Barber* points out that the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial.

⁶Furthermore, we note that under the facts of the instant case, which are far from atypical, not only was Porter's preliminary hearing cross-examination not introduced, but cross-examination at trial regarding his prior statements would have proved futile. Porter asserted that his prior statements may have been what he believed at the time, but he now could not remember the events in question. Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.

The judge in preliminary proceedings is not required to be convinced of the defendant's guilt "beyond a reasonable doubt," but need only look for reasonable credibility in the charge against him.⁷ *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity (see Jennings v. Superior Court (1967) 66 Cal.2d 867), neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 U.C.L.A. L.Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination.

Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause,⁸ would tend to develop into a full-scale trial. This would

⁷Penal Code section 872 provides in relevant part: "If . . . it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must [endorse the complaint]." "Sufficient cause" is "equivalent in meaning to 'reasonable and probable cause'" (Perry v. Superior Court (1962) 57 Cal.2d 276, 283), and the evidence before the committing magistrate "need not be such as would require a conviction." (People v. Nagle (1944) 25 Cal.2d 216, 222.)

⁸"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (Jaffe v. Stone (1941) 18 Cal.2d 146, 150.)

invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would constitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts of first instance.⁹

Although we recognize that some of the same practical difficulties exist, nothing we say here is intended to affect or cast doubt upon the viability or constitutionality of the long-established "prior testimony" exception to the hearsay rule. (Evid. Code, §§ 1290-1292.) This exception, as *Barber* points out, adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, outweigh the lack of contemporary cross-examination.¹⁰ Of course, no such "necessity" exists where the witness is present to testify at trial under oath, but for some disclosed or undisclosed reason does not relate the same

⁹Approximately 85 percent of felony proceedings in California superior courts originate in preliminary hearings. (Crime and Delinquency in Cal.: Report of Bureau of Criminal Statistics (1965) p. 66.) In the fiscal year of 1966-1967, this represented 64,308 felony preliminary filings in municipal courts and 7,256 in justice courts. (Annual Rep. of Judicial Council of Cal. (1968) pp. 107, 145.)

¹⁰Evidence Code section 1291 admits former testimony when the present defendant was a party to the hearing at which that testimony was taken "and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he had at the [present] hearing." Although preliminary hearing testimony was clearly contemplated by section 1291 (see comments thereto), the Supreme Court in *Pointer v. Texas* and *Barber v. Page* left open the question whether such prior testimony satisfies the confrontation clause of the Constitution, and we have no occasion to consider that question at this time. (But see *People v. King* (1969) *supra*, 269 A.C.A. 35, 42.)

version of events that he told previously and that a party anticipates he will tell.¹¹ This is strictly a question of credibility, to be dealt with, as has always been the case, by the use of immediate and contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statements for purposes of impeachment.

In summary, the rules that emerge from the cases and principles are these: cross-examination at trial relating to a statement or testimony given previously is constitutionally inadequate. (*Johnson*.) Cross-examination at the time of the statement, e.g., at a preliminary hearing, before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, is likewise constitutionally inadequate. (*Barber*.) A combination of these two negatives obviously cannot produce a positive. Therefore, cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before a different trier of fact, is not a valid substance for constitutionally adequate confrontation. The facts in the instant case compose that combination of negatives, compelling us to conclude that defendant was denied the right of confrontation guaranteed by the Sixth Amendment to the Constitution. Both prior statements by

¹¹"It is one thing to use prior testimony or out-of-court declarations under well formulated hearsay exceptions when the witness is dead, incompetent, or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation the hearsay is no longer reliable, and it is not the only evidence available." (*People v. Vinson* (1969) *supra*, 268 A.C.A. 728, 733.)

Porter should have been excluded for any purpose other than impeachment.

We pause to note, as we did in *Johnson* (68 Cal.2d at p. 658), that the Legislature was not unmindful of the likelihood that its overly broad approval of the use of hearsay in criminal cases would have constitutional implications. Thus it provided in Evidence Code section 1204: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

Since the two most damaging statements of the witness Porter are inadmissible as substantive evidence, and since we find no other substantial evidence of a narcotics transaction between Porter and defendant on the date charged, the prejudicial nature of the error is manifest (see fn. 1, *ante*), and the judgment of conviction must be reversed. (*Chapman v. California* (1967) *supra*, 386 U.S. 18.) We need not reach defendant's additional contentions of insufficiency of the evidence, suppression of evidence, and prejudicial misconduct.

The judgment is reversed.

Mosk, J.

We Concur:

Traynor, C. J.

McComb, J.

Peters, J.

Tobriner, J.

Burke, J.

Sullivan, J.

APPENDIX C

Opinion of the Court of Appeal

In the Court of Appeal of the State of California,
Second Appellate District, Division Five.

The People, Plaintiff and Respondent v. John Anthony Green, Defendant and Appellant. Cr. No. 13925.

Filed: Aug. 16, 1968.

APPEAL from a judgment of the Superior Court of Los Angeles County. Prentiss Moore, Judge. Reversed.

Cooney & Cooney, by Terrence W. Cooney, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and David B. Stanton, Deputy Attorney General, for Plaintiff and Respondent.

After a preliminary hearing, defendant was charged by information with violating section 11532 of the Health and Safety Code (furnishing a narcotic to a minor). Defendant pleaded not guilty and waived trial by jury. He was found guilty as charged. A motion for new trial was made and denied, and the defendant was granted probation, subject to certain conditions, among which was that he spend the first year of the five year probationary period in county jail. Defendant appeals from the judgment of conviction.

One Melvin Porter, the minor to whom it was alleged defendant furnished the narcotic, testified for the People. Porter admitted that he had been using marijuana for the two months or so preceding the incident for which defendant was informed against. He

also admitted that he had been using LSD upon occasion and that he had ingested some just prior to the contact with the defendant on the day that it was charged defendant furnished him with the contraband. Porter's testimony at the time of the trial was equivocal and far from helpful. He testified that defendant had called him early in January of 1967 and told him he had some "stuff" that he wanted Porter to sell. Porter also admitted that at about the same time, he had come into possession of 29 plastic bags filled with marijuana, in a large shopping bag. Porter admitted he sold some of the "Baggies" and the rest had been stolen from his closet. At first, Porter was very uncertain as to where he had obtained the marijuana. He then was impeached by the deputy district attorney by having portions of his testimony at the preliminary hearing read to him. The deputy argued that he had the right to introduce this evidence under sections 770 and 1235 of the Evidence Code. In that testimony, Porter stated that defendant called him and told him that he (the defendant) had about a kilo of marijuana in 29 Baggies that he wanted Porter to sell. Porter also testified at the preliminary hearing that defendant told him the marijuana was in the backyard of the home of defendant's parents. Porter also stated that his testimony at the preliminary hearing was the truth as he believed it at that time. He then testified that he guessed that he had procured the marijuana from the place designated by defendant and that he gave the money from the sale of bags to the defendant.

Officer Wade of the Los Angeles Police Department, who was assigned to the Juvenile Narcotics Division, testified that he had had a conversation with

Porter at the Juvenile Division headquarters on January 31, 1967. The deputy district attorney indicated this testimony came in for all purposes, again citing Evidence Code sections 770 and 1235. At that time, Porter said defendant had called him on the morning in question and told him he had a kilo of marijuana and wanted to know if he could bring it over to Porter's home. Later that day, defendant brought over 29 Baggies containing material that looked like marijuana. It was stipulated that Porter told Officer Wade that a similar course of conduct involving defendant's leaving marijuana at Porter's home, and the sale of some of it with the return of the proceeds to defendant, had been going on for the previous six months.

Officer Dominguez of the Los Angeles Police Department also testified. He stated that he had purchased from Porter on January 10, 1967 an item that upon analysis proved to be marijuana. Officer Dominguez also testified to a transaction that he had with defendant: that he had contacted Porter and said he wanted to buy some narcotics; Porter told him that he would contact "John"; thereafter the officer had a phone call from someone identifying himself as the man who had the stuff, and they arranged to discuss the matter at a hot dog stand in the San Fernando Valley; the officer met the defendant, who identified himself as John, as arranged; the defendant told him he would sell him 5 kilos of marijuana and 8 caps of LSD for \$500; the defendant then handed the Officer a cup of Coca-Cola with a white powdery substance in it; he told him that it was LSD and requested that he drink it. The Officer refused, saying he had a large amount of money with him and didn't want to be robbed; the

defendant also proposed they go somewhere and smoke a marijuana cigarette; the Officer refused this offer also; defendant said he feared undercover officers and wouldn't sell to anyone who wouldn't take narcotics with him, and no exchange took place.

Porter and the defendant were called as defense witnesses, and both testified that the transaction described by Officer Dominguez occurred as a test of the Officer. Porter had previously sold him some contraband and was afraid he was an officer. The meeting was set up to test to find out if Porter's apprehensions were justified. The material in the Coke was aspirin. Defendant testified he had nothing to do with narcotics, and he met with the Officer at the request of Porter to help Porter out. There was also defense testimony attacking Porter's credibility and reputation for truth and veracity, and indications that Porter was hostile toward defendant for repossessing a car he had sold him. The defendant in his testimony also denied that he did any of the illegal acts with which he was charged.

Defendant urges three grounds for reversal: (1) the evidence was insufficient to support the judgment; (2) the prosecution suppressed evidence; and (3) certain remarks of the prosecutor constituted prejudicial misconduct.

We do not reach any of the above issues, for we feel reversal is required in the light of the recent California Supreme Court case of *People v. Johnson*, 68 Cal.2d* That case held that Evidence Code section 1235, allowing prior inconsistent statements of a witness to be admitted for the truth of the matter asserted, is

*Advance report citation: 68 A. C. 674.

unconstitutional when applied in a criminal prosecution. In the instant matter, with the exception of the grudging acknowledgment by Porter that he "guessed" that the facts were as he testified to at the time of the preliminary hearing, all the substantive elements of the crime charged were proven through prior inconsistent statements. The reading of the testimony given at the preliminary hearing could not come in under the former testimony exception to the hearsay rule because the witness was available. (Evid. Code § 1291.) The statement by the minor to the investigating officer could not come in under the exception to the hearsay rule for declarations against interest for the same reason. (Evid. Code § 1230.) Although under the code it was proper for the prosecution to be allowed to impeach its own witness (Evid. Code §785), it was not proper to allow the evidence to be used as substantive evidence in the case. Since this inadmissible evidence constituted the bulk of the testimony linking the defendant to the crime with which he was charged, we must conclude that the error is reversible within the meaning of *Chapman v. California*, 386 U.S. 18.

o The judgment is reversed.

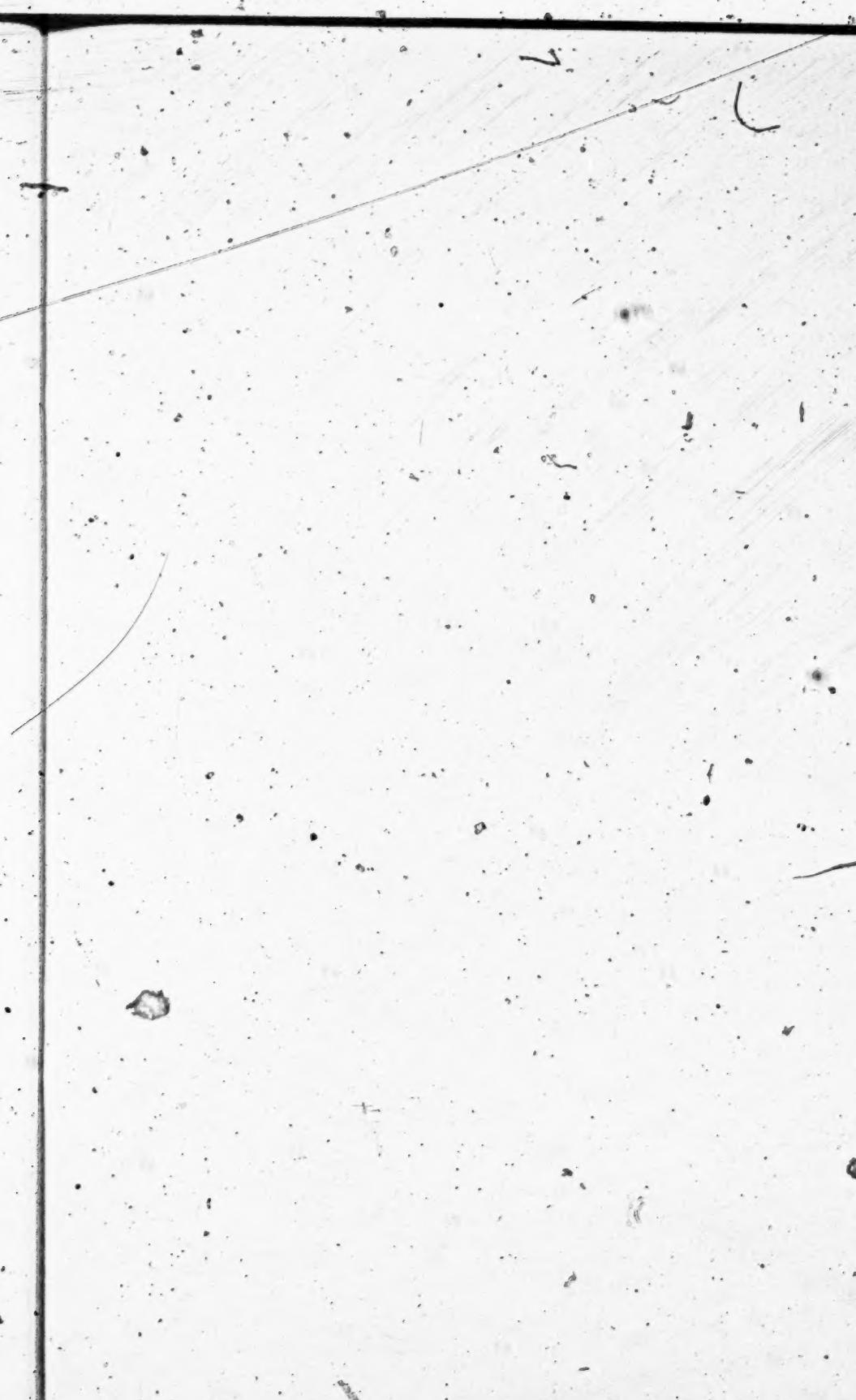
Stephens, J.

We concur:

Kaus, P. J.

Moore, J. pro tempro*

*Assigned by Chairman of the Judicial Council.



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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement	3
History of the Case	3
Factual Statement	4
Summary of Argument	8
Argument	10

I.

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope and Object of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial 10

- A. The Scope and object of the Right of Confrontation as Articulated by This Honorable Court 10
- B. The Interpretation of This Court's Rulings by the California Supreme Court 22

To Permit the Interpretation of the Confrontation Clause of the Sixth Amendment Made by the California Supreme Court to Stand as the Declaration of This Honorable Court Would Deter the Adoption by the State Courts and Legislatures, and the Committee on Rules of Evidence of the Judicial Conference of the United States, of Rules Admitting for the Truth of the Matter Asserted Prior Statements of a Witness Who Is Subject at Trial to Cross-Examination in Accord with Modern and Enlightened Authorities	25
Conclusion	40
Appendix. Constitutional Provisions Involved	1
	App. p.

TABLE OF AUTHORITIES CITED

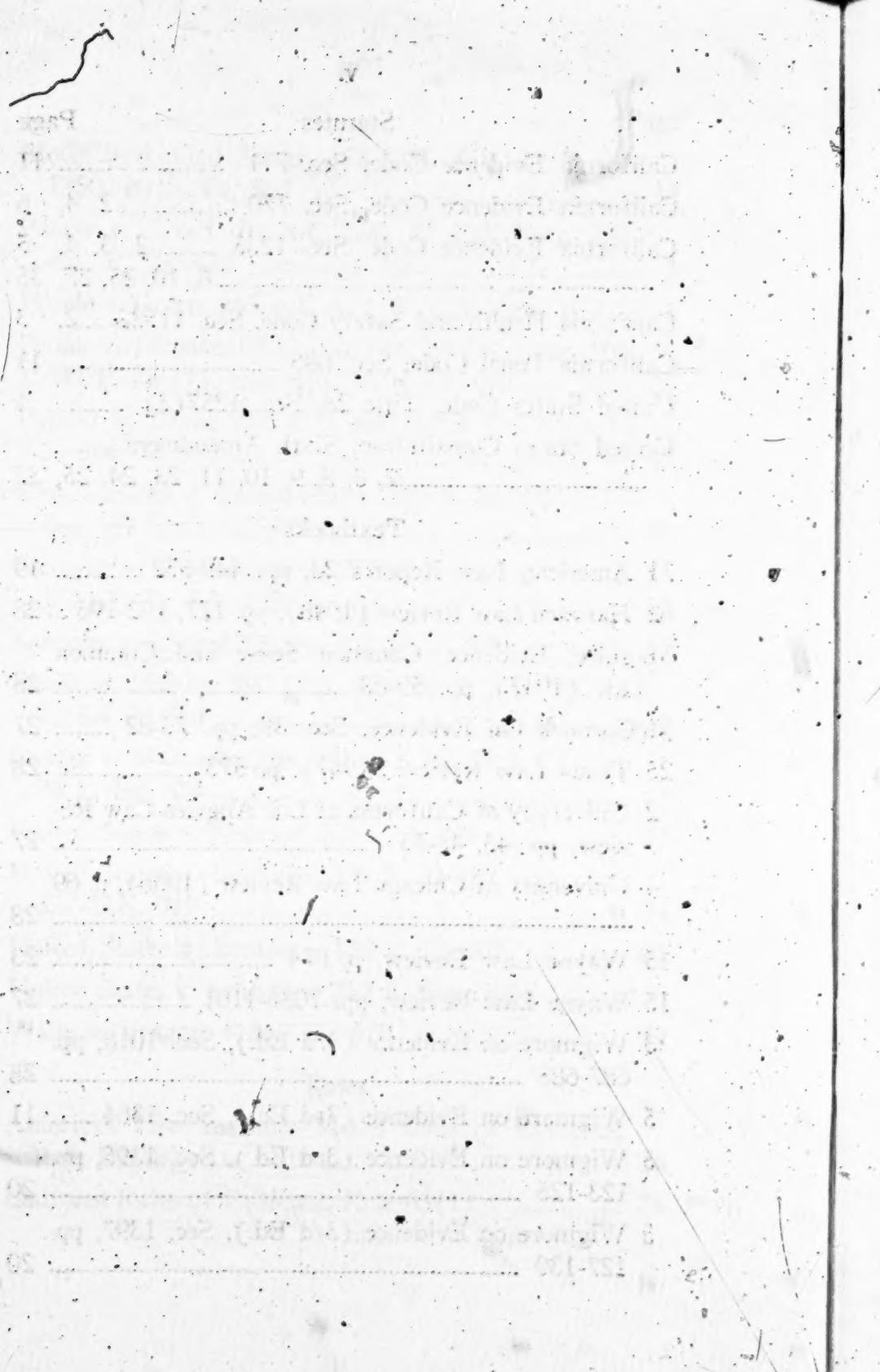
Cases	Page
Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255	2, 11, 13
Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508	13
Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314	11
Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 476	13, 15, 38
Curtis v. United States, 67 F. 2d 943	20
De Carlo v. United States, 6 F. 2d 364	19, 35
Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 934	12
Dowdell v. United States, 221 U.S. 325, 55 L. Ed. 753, 31 S. Ct. 590	12
Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178	19
Greene v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400	11
Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726	15
Hill, In re, 71 A.C. 1039, 80 Cal. Rptr. 537, 458 P. 2d 449	38
Jett v. Commonwealth, 436 S.W. 2d 788	31
Kay v. United States, 255 F. 2d 476	21
Kirby v. United States, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574	11, 12
Mattox v. United States, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337	12

	Page
Motes v. United States, 178 U.S. 458, 44 L. Ed. 1150, 20 S. Ct. 993	12
People v. Green, 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422	1
People v. Green, 265 A.C.A. 1, 71 Cal. Rptr. 100	3
People v. Johnson, 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, cert. den., 89 S. Ct. 679	23
Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923	2, 10, 12
Rios-Ramirez v. United States, 403 F. 2d 1016, cert. den., 89 S. Ct. 1292	15, 17
Salinger v. United States, 272 U.S. 542, 47 S. Ct. 173, 71 L. Ed. 398	21
Santoro v. United States, 402 F. 2d 920	15
Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956	11
Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674	21
United States v. Arnone, 363 F. 2d 385	35
United States v. De Sisto, 329 F. 2d 929, cert. den., 377 U.S. 979	34
United States v. Leathers, 135 F. 2d 507	21
United States v. Schwartz, 252 F. Supp. 866	35
Wade v. Yeager, 415 F. 2d 570	17

Rules

American Law Institute Model Code of Evidence, Rule 503(b)	26
Uniform Rules of Evidence, Rule 63(1)	26

	Statutes	Page
California Evidence Code, Sec. 711	11	
California Evidence Code, Sec. 770	2, 4, 6	
California Evidence Code, Sec. 1235	2, 3, 4, 5	
	6, 10, 25, 27, 35	
California Health and Safety Code, Sec. 11532	2, 3	
California Penal Code, Sec. 686	11	
United States Code, Title 28, Sec. 1257(3)	1	
United States Constitution, Sixth Amendment		
	2, 3, 8, 9, 10, 11, 23, 24, 25, 37	
 Textbooks		
71 American Law Reports 2d, pp. 449-552	19	
62 Harvard Law Review (1948), pp. 177, 192-196 ..	28	
Maguire, Evidence, Common Sense and Common Law (1947), pp. 59-63	28	
McCormick On Evidence, Sec. 39, pp. 73-82	27	
25 Texas Law Review (1947), p. 573	28	
2 University of California at Los Angeles Law Re- view, pp. 43, 48-55	27	
4 University of Chicago Law Review (1936), p. 69	28	
15 Wayne Law Review, p. 874	23	
15 Wayne Law Review, pp. 1086-1101	37	
3 Wigmore on Evidence (3rd Ed.), Sec. 1018, pp. 687-688	28	
5 Wigmore on Evidence (3rd Ed.), Sec. 1364	11	
5 Wigmore on Evidence (3rd Ed.), Sec. 1395, pp. 123-125	20	
5 Wigmore on Evidence (3rd Ed.), Sec. 1397, pp. 127-130	20	



IN THE
Supreme Court of the United States

October Term, 1969.

No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

PETITIONER'S OPENING BRIEF.

Opinion Below.

These proceedings on certiorari are before this Honorable Court to review a decision of the Supreme Court of the State of California which is reported as *People v. Green*, 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422.

Jurisdiction.

The opinion of the California Supreme Court issued on March 21, 1969. On June 18, 1969, an order was entered extending the time for filing the petition for writ of certiorari to and including July 11, 1969 and, by further order, extended to July 25, 1969. The case was docketed on July 25, 1969, and certiorari was granted on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions and Statutes Involved.

This case involves the Sixth Amendment to the United States Constitution and sections 770 and 1235 of the California Evidence Code. These provisions are reprinted in the Appendix to this brief along with California Health and Safety Code section 11532, the section involved in the accusation against respondent.

Questions Presented.

1. Do the holdings of this Honorable Court in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 and *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?
2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination by the accused and scrutiny as to demeanor by the trier of fact?

Statement.

History of the Case.

In an information filed by the District Attorney for the County of Los Angeles, respondent was accused of violating section 11532 of the California Health and Safety Code, furnishing, selling, and/or giving of a narcotic (marijuana) to a minor. (A. 1.) Respondent entered a plea of not guilty and waived trial by jury. (A. 2.) He was found guilty (A. 98), and his motion for a new trial was denied. (A. 101.) Proceedings were suspended and respondent was granted probation for five years. (A. 101.) One of the conditions of probation was that he serve one year in the county jail. He filed notice of appeal from the order granting probation. (A. 103.) Thereafter the Court of Appeal reversed the conviction on the ground that Evidence Code section 1235, which permitted the introduction of testimony given at a preliminary hearing for the truth of the matter asserted by a witness at the trial, was unconstitutional. (*People v. Green*, 265 A.C.A. 1, 71 Cal. Rptr. 100.) The petition of the People for a hearing on the constitutional issue in the California Supreme Court was granted, and following argument on the constitutional issue regarding the application of the confrontation clause of the Sixth Amendment, the California Supreme Court reversed the judgment on the ground that there was error of constitutional dimension in the admission of such prior inconsistent statements and that this holding was "impelled" by decisions of this Honorable Court. (A. 104-118.) The decision of the California Supreme Court was rendered on March 21, 1969.

4

Factual Statement.

In January of 1967, Melvin Porter, the minor to whom respondent was charged with furnishing the narcotic, was then age 16 years and had known the respondent for over four years. (A. 3-4.)

Porter acknowledged having used LSD (acid) a number of times and had been using marijuana about two or two and a half months prior to his arrest in late January, 1967. (A. 5.) At the trial, he testified that shortly after New Year's 1967, the respondent Green had called Porter at Porter's home and told Porter that he had some "stuff" that he wanted Porter to sell. (A. 5-6.) Porter at the trial testified that he did not recall whether Green brought something into the house on the day of the telephone call because he, Porter, was under the influence of LSD. (A. 7-8.)

At this point the People, pursuant to Evidence Code sections 1235 and 770, were permitted to impeach this testimony and to introduce for the truth of the matter asserted the testimony of Porter at the preliminary hearing in which Porter stated that respondent Green had told Porter in a conversation that he had a kilo of marijuana, that he was selling marijuana and that the marijuana came in 29 "baggies" in a large shopping bag. (A. 8-10.)

Porter at the trial stated that he could not recall how he had testified at the preliminary hearing, but that his testimony at that time was the truth as he believed it. (A. 11.) At the trial Porter maintained that he could not recall how he came into possession of the marijuana but that he did come into possession of 29 "baggies," that he smoked some of the marijuana, making it into

cigarettes. (A. 12-14.) He sold a few of the baggies and the rest were stolen from his closet. (A. 15-16.) Among the sales Porter made of this marijuana was a sale to Officer Dominguez. (A. 16.) At the trial, Porter testified that someone told him where he could find the marijuana but that he was not certain who the person was or where the marijuana was found. (A. 17-18.)

At this time, Porter was again impeached pursuant to Evidence Code Section 1235 by the reading of his testimony on cross-examination at the preliminary hearing. (A. 18-20.) At that hearing Porter testified that respondent Green came into his home on the 5th or 6th of January and told him that he had some "Grass" or marijuana to sell; that he wanted Porter to sell the stuff and to give Green the money when he got it, and that Green told him that the marijuana could be found at Green's father's home; that Porter got the shopping bag at Green's parents house and that Green showed him where it was. (A. 21-22.)

At the trial, Porter testified that he was telling the truth at the time he testified at the preliminary (A. 20), that he guessed that the reading of the questions and answers refreshed his recollection, mostly as to his testimony. Porter stated that of his own knowledge, with his recollection refreshed, he guessed he obtained the marijuana from the back yard of Green, and that Green told him where the marijuana could be found. (A. 22-23.) Porter testified that he sold some of the marijuana and thought that he gave the proceeds to Green. (A. 23.)

Officer Barry M. Wade, a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Di-

vision, had a conversation with Porter at the Juvenile Division Headquarters on January 31, 1967. (A. 27.) Officer Wade testified that Porter was sober at that time. Porter told Officer Wade that Green called him in the morning and stated that he had a kilo of marijuana and wanted to know if he (Green) could leave it at Porter's house. Green came to Porter's house later with a brown shopping bag containing 29 baggies of a green leafy substance which Porter recognized as being similar to marijuana. (A. 37.) This conversation was introduced for the truth of the matter asserted pursuant to Evidence Code sections 1235 and 770. (A. 28.)

It was stipulated at the trial that Porter said to Officer Wade that on previous occasions during the five months preceding his arrest Green brought large quantities of marijuana to Porter's home for storage and that Porter used a portion of this and paid Green therefor; that Porter sold marijuana to buyers who came to his home from the marijuana stored by Green and turned the money over to Green. (A. 74-75.)

Officer Ramon Dominguez, during January of 1967, was acting as an undercover officer attempting to purchase marijuana from narcotic sellers. (A. 43.) During this period (January 10) he purchased marijuana from Porter. (A. 44.) Officer Dominguez's testimony as to an appointment with Green was limited to the purpose of showing that Green and Porter had previous associations and were acquainted. (A. 48-54.) It was stipulated that the substance sold Dominguez by Porter was marijuana. (A. 45-46.)

As part of the defendant's case, the witness Porter was called for further cross-examination. (A. 56-68.) Porter testified that he had set up an appointment be-

tween Dominguez and Green. (A. 58.) Porter testified at the trial that Green wanted to sell Officer Dominguez \$500 worth of peat moss if Dominguez wanted "grass" or baking soda if he wanted "acid." (A. 58.) Porter was asked about his testimony at the preliminary hearing relating to picking up the shopping bag at Green's parents' house and taking it to his house and also his statement to Officer Wade that Green brought the marijuana to Porter's house. He admitted that he had so testified and that he had talked to Officer Wade about buying some narcotics from Green and that he might have said Green wanted to leave it at his (Porter's) home, that he believed he was telling the truth when he talked to Officer Wade, when he testified at the preliminary and when he testified in court. (A. 58-60.) He testified that in January, 1967, he had told a Mr. Blackmore that he was going to get even with Green for repossessing a car which Green had sold him. (A. 60-61.) He admitted that Green brought over marijuana on a couple of occasions. (A. 64.)

Green testified on his own behalf at the trial, stating that he had sold a car to Porter in 1966 which Porter failed to pay for and which he had repossessed. (A. 76.)

Green testified that Porter called him in January and said that he thought he had sold marijuana to a police officer and asked Green to talk to the suspected officer to determine whether he was in fact an undercover agent. (A. 77.) Porter gave him (Green) the idea that he should attempt to sell the officer \$500 worth of peat moss. Green testified that as a result of his conversation he (Green) called Officer Dominguez and at Porter's request arranged a meeting at the hot dog stand where the conversation to which Officer Dominguez had

testified took place. (A. 78.) Green, testified that he had put aspirin in the coke because he assumed that an officer would not consume narcotics. Green denied that he sold marijuana to Porter, stating that on several occasions Porter had offered him marijuana to smoke but that he had refused. He said that he was familiar with the going price of narcotics because he had heard persons talk about it. (A. 79-80.)

Summary of Argument.

The confrontation clause of the Sixth Amendment to the United States Constitution secures for an accused one of the basic rights of a fair trial, the opportunity to have full cross-examination of the witnesses against him and, as a secondary right, that of compelling a witness to stand face to face before the trier of fact in order that the trier may judge of the demeanor of the witness and, from the manner in which he gives his testimony, determine whether he is worthy of belief. This has been the clear interpretation of that clause by this Honorable Court. This Court has *not* held that prior utterances of a witness may not be given substantive effect or that confrontation is denied an accused if prior statements are received in evidence of a witness who is present in court and the accused is afforded an opportunity to cross-examine him. The holdings of this Court, recent and past, do not "impel" the conclusion reached by the California Supreme Court that a statute admitting prior statements for the truth of the matter asserted violates the confrontation clause of the Sixth Amendment. It is not the mandate of the United States Constitution that only a "contemporaneous" utterance of a witness may be admitted before a

trier of fact; there is no mythical necessity that a case must be decided only in accordance with the truth of words uttered under oath in court. Accordingly, the California Supreme Court has misinterpreted the holdings of this Court.

The confrontation clause of the Sixth Amendment does not prevent the states or the Committee on Rules of Evidence of the Judicial Conference from adopting rules admitting, for the truth of the matter asserted, prior statements of a witness who is subject at trial to cross-examination; such rules are advocated by modern and enlightened legal and judicial authorities. The provisions of the United States Constitution apply uniformly across this nation and this Honorable Court is the final arbiter of the scope and object of its provisions, including the confrontation clause of the Sixth Amendment. A holding of a state court not in accord with this Court's decisions interpreting that clause should be reversed and proper guidance given to those authorities, state and federal, developing rules of evidence to govern the judicial proceedings in our courts. The recent decision of the California Supreme Court clearly indicates the necessity for such guidance and it is the contention of petitioner herein, that the judgment of the California Court, premised as it is on a misconception of this Court's holdings on a federal Constitutional question, should be reversed.

ARGUMENT.

I.

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope and Object of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial.

A. The Scope and Object of the Right of Confrontation as Articulated by This Honorable Court.

This proceeding is before this Honorable Court on the granting of the petition of the State of California in which it was contended that the Supreme Court of California improperly held unconstitutional California Evidence Code section 1235¹ upon an unwarranted construction of the Sixth Amendment to the United States Constitution and a misinterpretation of the holdings of this Court articulating the scope and object of the confrontation clause of that amendment.

The Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the

¹California Evidence Code section 1235 provides:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770" (See Appendix)

witnesses against him.² *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, held that the right of confrontation includes both the opportunity to cross-examine and the occasion for the jury (trier of fact) to weigh the demeanor of the witness.

This Court has held that one of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witness against him."

Kirby v. United States, 174 U.S. 47, 43 L. Ed. 890, 19 S. Ct. 574.³

In *Greene v. McElroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 1391, 79 S. Ct. 1400, it was stated that certain principles remain immutable in our jurisprudence and these protections have been formalized in the requirements of confrontation and cross-examination. As Wigmore said (5 Wigmore Evidence, 3rd Ed. Sec. 1364) they are basic ingredients in a fair trial.

This Honorable Court has said that the primary object of the confrontation clause was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against a prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the con-

²The California Constitution has no similar provision. See California Penal Code section 686, California Evidence Code 711.

³See also:

Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956;

Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314.

science of the witness but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242, 39 L. Ed. 409, 411, 15 S. Ct. 337.

A primary interest secured by the confrontation clause is the right of cross-examination and an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.

Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 934.

In *Pointer v. Texas*, *supra*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065, it was said that a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witness against him.

Dowdell v. United States, 221 U.S. 325, 330, 55 L. Ed. 753, 757, 31 S. Ct. 590;

Motes v. United States, 178 U.S. 458, 474, 44 L. Ed. 1150, 1156, 20 S. Ct. 993;

Kirby v. United States, 174 U.S. 47, 55-56, 43 L. Ed. 890, 893, 19 S. Ct. 574.

In *Pointer v. Texas*, *supra*, the witness who had testified at the preliminary hearing was *not available* at the trial for confrontation and cross-examination, and in that case the defendant, because of lack of counsel at the preliminary hearing, was denied the meaningful cross-examination by counsel required by the confrontation clause of the United States Constitution.

In *Barber v. Page*, *supra*, likewise, the declarant *did not confront* the defendant at the trial and no effort had been made to procure his presence for confrontation and cross-examination at the trial prior to the introduction of the testimony taken at the earlier hearing. Accordingly, this Honorable Court held that there had been a denial of confrontation.

In *Barber v. Page*, *supra*, this Honorable Court noted that there was no confrontation at the trial and no adequate showing to dispense with actual confrontation. It was said,

“... The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.”

In *Berger v. California*, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508, it was noted that the petitioner's inability to cross-examine an absent witness at trial might have had a significant effect on the integrity of the fact-finding process and that in *Barber v. Page*, one of the important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses.

In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, this Court said:

“We applied Pointer in *Douglas v. State of Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as a

witness against him. An appeal was pending from Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas 'the right of cross-examination secured by the Confrontation Clause.' 380 U.S., at 419, 85 S.Ct. at 1077. We noted that '* * * effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer.' Id., at 420, 85 S.Ct. at 1077. The risk of prejudice in petitioner's case was even more serious than in Douglas. In Douglas we said, 'Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.' Id., at 419, 85 S.Ct. at 1077. Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly

before the jury during their deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. *Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.*" (Emphasis added.)

As was implicit in this Honorable Court's holding in *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726, where one of the declarants was present in court and testified and was subject to cross-examination by counsel for the defendant, no denial of the right of confrontation as to him was presented. This had been the holding in the Court of Appeal, Ninth Circuit, prior to the decision in *Harrington*. See: *Rios-Ramirez v. United States*, 403 F. 2d 1016, 1017, certiorari denied April 1, 1969, 89 S. Ct. 1292; *Santoro v. United States*, 402 F. 2d 920, 922-923 (9th Cir.).

In *Santoro v. United States, supra*, 402 F. 2d 920, 921-923, the court discussed the scope of the holding in *Bruton* as follows:

"On this remand, we are asked to decide whether the introduction at trial of the post-arrest statements of codefendants LaMagna, Coduto and Haynes violated appellant's right of confrontation secured by the sixth amendment. After careful reconsideration in light of *Bruton v. United States* *supra*, we hold that appellant's rights were not vio-

lated and, hence, affirm the conviction below, for the reasons which follow.

"In Bruton, the out of court confession of the petitioner's codefendant, Evans, that the latter and petitioner had committed armed robbery, was admitted in evidence. Evans did not testify at trial and, therefore, was not subject to confrontation or cross-examination by Bruton. The trial court, relying upon Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), instructed the jury that the declarant's confession inculpating the petitioner had to be disregarded in determining the latter's guilt or innocence. Overruling Delli Paoli and reversing the conviction, the Court in Bruton held that it could not accept limiting instructions as an adequate substitute for the petitioner's constitutional right of cross-examination. The only acceptable course under the circumstances was exclusion of the confession.

In its opinion, the Court stated:

'Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.' Id., 391 U.S. at 127-128, 88 S. Ct. at 1623.

"The Court concluded:

"'The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.' Id., at 136, 88 S. Ct. at 1628.

"Thus, the Court emphasized that Bruton's rights were violated because he could not cross-examine his codefendant.

"Contrary to the case in Bruton, the three defendants whose out of court statements incriminated appellant Santoro all took the stand (as did appellant himself). Thus, appellant had an opportunity to confront and cross-examine those persons whose statements inculpated him. Indeed, defendants LaMagna, Coduto and Haynes were thoroughly questioned and cross-examined by the Government at trial. (Their testimony covers some 150 pages of the transcript.) Therefore, the confrontation rationale of Bruton is not applicable in the present case."

See also: *Wade v. Yeager*, (3rd Cir.) 415 F. 2d 570, 572.

In *Rios-Ramirez v. United States*, *supra*, 403 F. 2d 1016 (cert. denied April 1, 1969, 89 S. Ct. 1292), it was said:

"The question we must now decide is whether the admission at appellant's joint trial of extra-judicial statements made by appellant's codefendant, Manzano, allegedly incriminating appellant, violated appellant's right of cross-examination secured by the confrontation clause of the sixth amendment. After careful reconsideration in light of Bruton and cases based thereon, we hold that appellant's rights were not violated and, hence, affirm the conviction below, for the reasons which follow.

"We recently had occasion to discuss the holding in Bruton and apply the principles expounded

therein. In *Santoro v. United States*, 402 F.2d 920 (9th Cir. October 31, 1968), we noted that the Supreme Court had held that petitioner Bruton's 'constitutional right of cross-examination' had been denied where the Government introduced the out-of-court confession of the petitioner's codefendant which implicated the petitioner, where the codefendant did not take the stand and was, therefore, not subject to confrontation and cross-examination by the petitioner. We then held in *Santoro* that because the appellant's three codefendants all took the stand, the appellant had an opportunity—unlike Bruton—to confront and cross-examine the witnesses against him, and thus appellant *Santoro*'s rights were not denied him.

"In the present case, counsel for appellant Rios-Ramirez does not indicate which extrajudicial statements he finds objectionable in light of Bruton. From our study of the record, however, it would appear that the objectionable statements appear at pages 334 and 359 of the Reporter's Transcript. In the first instance, Agent Saiz testified for the Government:

"As in *Santoro*, and contrary to the case in *Bruton*, defendant Manzano in the present case took the stand and testified regarding the subject of her out-of-court statements. Much of her direct testimony concerned appellant Rios-Ramirez. (See R.T. 565-580.) Following her direct testimony, defendant Manzano was thoroughly cross-examined by appellant's attorney: (See R.Tr. 582-599.) (In this case, each defendant was represented by separate counsel.) Thus, appellant not only had an

opportunity to confront and cross-examine the person whose statements inculpated him, but he in fact took advantage of this opportunity and exercised his constitutional rights. *Under these circumstances, we do not see how appellant can claim that his right of cross-examination, secured by the confrontation clause of the sixth amendment, has been violated.*" (Emphasis added.)

In *Gilbert v. California*, 388 U.S. 263, 272 (Footnote 3), 87 S. Ct. 1951, 18 L. Ed. 2d 1178, this Court noted that there is a split of authority on the admissibility of prior extra judicial identification as independent evidence of identity. It was therein stated that the recent trend is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See: Annotation, 71 A.L.R. 2d 449-552.

In *De Carlo v. United States*, 6 F. 2d 364, 368, Judge Learned Hand noted that a witness who is asked about prior statements is present before the jury and they may gather the truth from his whole conduct and bearing, even if it be in respect to contradictory answers he may have made at other times. Judge Hand said that the possibility that the jury may accept as the truth the earlier statements in preference to those made on the stand presents no difficulty. If they decide what he said before was the truth and not what he says now, they are none the less deciding from what they see and hear of that person and in court, "There is

no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in Court."

See: Curtis v. United States, (10th Cir.) 67 F. 2d 943, 946.

Wigmore in his work on Evidence details the development of Confrontation, including the definition by this Honorable Court in some of the cases heretofore cited, sections 1395-1397. He concludes that the process of confrontation has two purposes:

(1) The main and essential purpose is to secure for the opponent the opportunity of cross-examination. He notes that this is the true and essential significance of confrontation, as clearly shown from the beginning of the Hearsay rule to the present day.

See cases and authorities cited, 5 Wigmore (3rd Ed.), section 1395, pp. 123-125.

(2) A secondary advantage (referred to as subordinate) to be obtained from personal appearance of the witness was that the judge and the jury were enabled to see and hear the witness (pp. 125, 126).

Wigmore states that in the United States almost all Constitutions have given a permanent sanction to the principle of Confrontation by clauses requiring that in criminal cases the accused shall be "confronted with the witnesses against him", or "brought face to face with them." *See 5 Wigmore (3rd Ed.) section 1397 and cases and constitutional and statutory provisions set forth in the footnote pages 127-130.*

Wigmore says that there never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was invoked in and secured by confrontation; it was the same right under different names. Thus, it follows that if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.

Wigmore concluded that the rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all exceptions that may legitimately be found, developed, or carved therein.

And, in *Snyder v. Massachusetts*, 291 U.S. 97, 107, 54 S. Ct. 330, 78 L. Ed. 674, it was noted that the privilege of confrontation has not been at any time without recognized exceptions. The Court continued, "The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason for the rule.

See Kay v. United States, (4th Cir.) 255 F. 2d 476, 480-481;

United States v. Leathers, (2d Cir.) 135 F. 2d 507, 511.

In *Salinger v. United States*, 272 U.S. 542, 548, 47 S. Ct. 173, 71 L. Ed. 398, this court stated:

"The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions."

After citing previous cases on the issue, the Court concluded,

"The present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited."

With the foregoing analyses of the scope of confrontation as defined by this Court, we now will review the interpretation given to that clause and the recent holdings of this Court by the California Supreme Court.

**B. The Interpretation of This Court's Rulings
by the California Supreme Court.**

The California Supreme Court purporting to interpret the recent decisions of this Honorable Court, has held that the confrontation clause does not permit the introduction of prior inconsistent statements of a witness even though he is subject to cross-examination at the trial and to the view of the trier of fact.

As is evident from a review of the record in the trial court in this case, the witness Porter, whose prior statements are in issue, confronted the defendant Green at trial, was subject to cross-examination and his demeanor in testifying was subject to the scrutiny of the trial judge, who was the trier of fact; additionally, Porter was available and was called for further cross-examination during the defendant's case in chief. Green also had confrontation with counsel present at the preliminary hearing and was afforded a full opportunity to cross-examine this witness under oath at that time.

Despite the clear guidelines set forth in the cases decided by this Court relating to the confrontation clause, the California Supreme Court, following its earlier venture in interpreting the Sixth Amendment in *People v. Johnson*,⁴ 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, cert. denied 1969, 89 S. Ct. 679, said (at page 701, 70 A.C.):

". . . Our decision was *impelled* by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer v. Texas* (1965) 380 U.S. 400; *Barber v. Page* (1968) 390 U.S. 719.)"
(Emphasis added.)

Notwithstanding the decisions to which reference is made herein, the California Supreme Court said that this Honorable Court has held that the opportunity for cross-examination before the ultimate trier of fact was not satisfaction of the "*contemporaneous*" confrontation mandate of the Sixth Amendment because it was "not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal." In explanation of this interpretation the California Court said (80 A.C. at 703-704):

"The import of Barber and other recent Supreme Court decisions was spelled out in *Johnson*: These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same

⁴See critical discussion of *Johnson* in 15 Wayne Law Review 874.

trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand. (Italics in original.) (People v. Johnson (1968), supra, 68 Cal. 2d 646, 659, 660.) We reiterate that the 'contemporaneous' cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc.*" (Footnote omitted.)

The petitioner herein contends that defining the scope and object of the United States Constitution is the exclusive function under that document of this Honorable Court and that other courts may not in the guise of "interpretation" of the decisions of this Court, alter the meaning of the terms contained therein as defined by this Court. The United States Constitution is uniformly applied and its terms are interpreted by this judicial body in accord with its mandate.

It is respectfully submitted that this Court has not interpreted the confrontation clause of the Sixth Amendment to limit the power of state legislatures and courts and the federal courts in enacting legislation or adopting rules permitting the admission for the truth of the matter asserted of prior statements of a witness who is available at trial for cross-examination and whose demeanor is subject to the scrutiny of the trier of fact.

It is evident that there was no denial of the right of confrontation to the defendant in the instant case and that the California Supreme Court was *not* "impelled" by this Court's recent decisions to hold that there was a violation of the Sixth Amendment to the United States Constitution.

II.

To Permit the Interpretation of the Confrontation Clause of the Sixth Amendment Made by the California Supreme Court to Stand as the Declaration of This Honorable Court Would Deter the Adoption by the State Courts and Legislatures, and the Committee on Rules of Evidence of the Judicial Conference of the United States, of Rules Admitting for the Truth of the Matter Asserted Prior Statements of a Witness Who Is Subject at Trial to Cross-Examination in Accord With Modern and Enlightened Authorities.

The petitioner herein contends that the misinterpretation of this Honorable Court's holdings on the scope of the Confrontation Clause by the California Supreme Court may prevent admission in evidence of relevant prior statements of witnesses at the trial, as well as precluding admission in evidence of previously accepted exceptions to the hearsay rule; that such a misinterpretation could prevent adoption of enlightened and progressive legislation and rules of evidence by the various states and by the Federal Courts.⁵ Eminent authorities have recognized the worth of the rule of evidence enacted in California Evidence Code section 1235 in the as-

⁵See discussion *infra*, in regard to the Proposed Rules of Evidence for the Federal District Courts and Magistrates.

certainment of the truth at trial. A discussion of some of those authorities follows:

The American Law Institute Model Code of Evidence Rule 503(b) would permit admission in evidence of hearsay declarations if the judge finds that the declarant is present in court and subject to cross-examination.

In discussing the pertinent portion of this rule, the comment is as follows:

"As to clause (b) the declarant is always present and subject to cross-examination. If he purports to remember the pertinent matter, the adversary is fully protected and the jury is in a favorable position to place a fair value upon the declaration in combination with declarant's present testimony. If the judge believes that the increment of value which the declaration would add to the present testimony of the witness is negligible, he may exclude evidence of the declaration under Rule 303. If the witness now purports to have no recollection of the matter or insists that he never had any knowledge of it, the need for the evidence is just as great as if he were unavailable. Moreover both the adversary and the jury are in a more advantageous position to evaluate the evidence than they would be if the declarant were not subject to present cross-examination. They need not rely solely upon the witness who reports the declaration; they have him and the declarant before them, and can make up their minds whether to believe either or neither of them."

Rule 63(1) of the Uniform Rules of Evidence provides for the admissibility of previous statements made

by a person who is present at the hearing and is available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness. The commissioners of the Uniform Code comment that this adopts the American Law Institute Model Code of Evidence and note that this rule has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross-examination were not impaired and that court decisions have admitted evidence of prior inconsistent statements for its full value not limited merely to impeachment. The commissioners further note that when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

See: Falknor, "The Hearsay Rule and Its Exceptions, 2 U.C.L.A. Law Review, 43, 48-55.

Professor McCormick in his work on Evidence, section 39, pp. 73-82, presents compelling arguments in support of the rule codified in California Evidence Code section 1235. Among the many advantages of such a rule he notes that it effectively deals with the "turncoat witness" and permits introduction of the more reliable earlier statements since they are made nearer in time to the event related. He points out that the important requirement of confrontation, cross-examination, is preent and that this is the most essential safeguard.

Wigmore, who first approved the orthodox view on the subject, has in the latest edition concluded that the natural and correct solution is to admit prior incon-

sistent statements as having affirmative testimonial value when the witness is present and subject to cross-examination.

3 Wigmore (3rd Ed.), section 1018, pp. 687-688.

In discussing the Orthodox Rule, that prior self contradictions are not to be treated as having any substantive or independent testimonial value, Wigmore says that the only ground for treating such statements as having no affirmative testimonial value would be the Hearsay Rule. "But," says Wigmore, "the theory of the Hearsay Rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination." Wigmore then notes that the whole purpose of the Hearsay Rule has been satisfied. Hence, there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve; the one statement is as useful as the other and, Wigmore concludes, everyday experience outside of courtrooms is in accord.

3 Wigmore (3rd Ed.) Sec. 1018, pp. 687-688.

See also Ladd, *Impeachment Of One's Own Witnesses — New Developments*, 4 U. Chi. L. Rev. 69 (1936); Maguire, Evidence, *Common Sense and Common Law*, at pages 59-63 (1947); McCormick, *The Turncoat Witness: Previous Statements As Substantive Evidence*, 25 Texas L. Rev. 573 (1947); Morgan, *The Hearsay Dangers and The Application of The Hearsay Concept*, 62 Harv. L. Rev. 177 (1948) at 192-196; Morgan,

The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481 (1946), at 545-555.

In *Gelhaar v. State*, 163 N.W. 2d 609, the Wisconsin Supreme Court recently held that a jury should be able to consider the prior inconsistent statements of a witness as substantive evidence.

In discussing some of the authorities cited above the Wisconsin court said:

"Professor McCormick contends that the two safeguards of the truth of testimony are the oath (with its penalty for perjury) and cross-examination. Of these, the most important is cross-examination. But, for all practical purposes, this safeguard is available when extrajudicial statements are used to impeach a witness."

"* * * It is hard to escape the view that evidence of a previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in a high degree the safeguards of examined testimony."

"Accordingly, if we look to the procedural guarantees of truth of the prior statement and of the present testimony of the same witness, we can only conclude that they stand approximately equal, * * * McCormick, *supra* at page 75."

"But another factor makes the *prior* inconsistent statement even more trustworthy than testimony.

"* * * The prior statement is always nearer and usually very much nearer to the event than is the testimony. * * *

"Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy. No, but the time-element plays an important part, always favoring the earlier statement, in respect to all of these hazards.* * *

"McCormick, *supra*, at pages 75 and 76.

"There is a further reason favoring the use of prior statements substantively. The attempt to deny the full probative effect to such statements is, even charitably considered, usually ineffectual. The evidence of prior statements goes to the jury anyway as impeaching evidence, but the jury is ordinarily instructed that it can consider the evidence solely as bearing on the credibility of the witness.

"* * * Such an instruction, as seems to be generally agreed is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture. If the prior statement and the present testimony are to be considered and compared, what is the purpose? The intuitive good sense of laymen and of lawyers seems to agree that the only rational purpose is not merely to weigh the credibility of the testimony, but to decide *which of the two stories is true*. To do this is ordinarily to decide the substantive issue."

"McCormick, *supra*, at page 77.

"Then McCormick discusses a subject which is particularly pertinent to this appeal. When the state's only witness to a material fact in a criminal case is cross-examined by a prior inconsistent statement, the jury can use the inconsistent statement to cancel the witness' testimony. Thus it makes no difference whether the statement is considered as 'substantive' or 'impeaching' evidence. The result is the same, i.e., a verdict for the defendant. But when the state has only an inconsistent statement from the defendant's witness, it cannot even get to the jury. Basically that is what defendant is contending here. The only evidence of intent could come from the children. Even if their testimony at the trial is disbelieved by the jury, there is no 'substantive' evidence of intent in the case.

"* * * * The argument seems persuasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself.' McCormick, *supra*, at page 78.

"Thus we are now convinced that a jury should be able to consider the prior inconsistent statements of the witnesses as substantive evidence. Previous Wisconsin cases which have held to the contrary are therefore expressly overruled."

The Court of Appeal in Kentucky in a recent decision, *Jett v. Commonwealth*, reported in 436 S.W. 2d 788, at 792, refers to the direct and sensible approach set

forth in the Model Code of Evidence and the Uniform Rules of Evidence. The court reasoned:

"That the out-of-court statement is hearsay, and not given under oath, is the traditional reason why it is generally held not admissible as substantive testimony. That cannot, however, be the reason for denying its admission for purposes of impeachment, because even in those cases where proof of contradictory statements is clearly admissible they are still second-hand. In short, the *prior statement is not primarily hearsay*, because it is not offered assertively, i.e., not testimonially. The Hearsay Rule * * * simply forbids the use of extrajudicial utterances as credible *testimonial* assertions; the prior contradiction is not offered as a testimonial assertion to be relied upon. It follows, therefore, that the use of prior self-contradictions is not obnoxious to the Hearsay Rule." Wigmore on Evidence (3d ed.) § 1018 (Vol. III, p. 687). The real basis for its exclusion in the case where the witness has merely failed to come through with something the examiner wanted him to say is that there is nothing to impeach. If he has not said anything damaging to the examiner, there is no purpose to be served by an attack on his credibility. In such a case the only real purpose the out-of-court statement could serve is to supply substantive evidence in the guise of impeachment. That is, of course, the practical effect of such testimony anyway, and a number of the greatest text writers and jurists of our time have agreed that the 'artificial rule' against admitting, as substantive evidence, out-of-court statements made by a witness should be either

relaxed or completely abandoned. Cf. Wigmore on Evidence (3d ed.), §1018, (Vol. III, p. 687); McCormick on Evidence, § 39, (pp. 73-82). Both the Model Code of Evidence (Rule 503)² of the American Law Institute and the Uniform Rules of Evidence (Rule 63)³ admit evidence of a hearsay declaration previously made by a person who is present and subject to cross-examination provided the statement would be admissible if made by the declarant while testifying as a witness.

“The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: “The declarant as a witness is now under oath and now purports to remember and narrate exactly. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part.”” Edmund M. Morgan, ‘Hearsay Dangers and the Application of the Hearsay Concept,’ 62 Harv. L. Rev. 177, 192 (1948).

“When both the person who is said to have made the out-of-court statement and the person who says he made it appear as witnesses under oath and subject to cross-examination there is simply no justification for not permitting the jury to hear, as substantive evidence, all they both have to say on the subject and to determine wherein lies the truth. The direct and sensible approach set

forth in the Model Code of Evidence and the Uniform Rules of Evidence eliminates the necessity of distinguishing between a 'contradiction' and that which from a technical standpoint is not so much contradictory as it is supplementary—that is between 'positive' and 'negative' testimony given by the first witness. We are of the opinion that when a witness has testified about some of the facts of a case the jury should know what else he has said about it, so long as it is relevant to the merits of the case as distinguished from collateral issues. Our opinions to the contrary, beginning with *Champ v. Commonwealth*, 59 Ky. (2 Metc.) 17, 74 Am.Dec. 388 (1859), and including both those that apply to one's own witness and those that apply to the adversary's witness, are overruled." (Footnotes omitted)

The Second Circuit Court of Appeals, speaking through Judge Friendly in *United States v. De Sisto* (1964), 329 F. 2d 929, *cert. denied*, 377 U.S. 979, gave substantive effect to a prior identification of the accused to supply an element in support of a jury verdict. Squarely faced with the question of the evidentiary status of prior inconsistent statements, the court well stated the position of petitioner at page 933:

"The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachronism 'that still impede(s) our pursuit of the truth.' [Citations omitted.] The sanctioned ritual seems peculiarly absurd when a wit-

ness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75-76 (1954). . . ."

See also *United States v. Arnone* (2nd Cir. 1966), 363 F. 2d 385 [De Sisto followed]; *United States v. Schwartz* (E.D. Pa. 1966), 252 F. Supp. 866, and also Judge Learned Hand's discussion in *Di Carlo v. United States*, *supra* (1925), 6 F. 2d 364, *cert. denied*, 268 U.S. 706, espousing the principles later adopted in California Evidence Code section 1235.

In March of 1969, the Advisory Committee on Rules of Evidence presented to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts

and Magistrates. These rules would admit the evidence that the California Supreme Court has held inadmissible under the holdings of this Honorable Court. See Rule 8-01,(c)(2).

In discussing this rule the Advisory Committee said (46 F.R.D. 161, 336-337):

"Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who

changes his story on the stand and deprives the party calling him of evidence essential to his case.' Comment, California Evidence Code § 1235. See also McCormick § 39.

"The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. Reptr. 599, 441 P. 2d 111 (1968). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements."

See the endorsement contained in the Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates, February 1970.

See also:

15 Wayne Law Review 1086-1101; 48 F.R.D. 62.

The need for a declaration on this important question by this Honorable Court is evident. The final arbiter of the scope of the commands of the Federal Constitution on the states and Federal Courts is this Court.

The California Supreme Court has said the result reached by it in the instant case was "impelled" by the decisions of this Court interpreting the Confrontation Clause of the Sixth Amendment. If this is incorrect, but permitted to stand as an interpretation of this Court's holdings on the question, the Committee on Evidence for the Federal Courts, as well as the

State courts and legislatures, may be deterred from fully considering this sensible and enlightened rule of the modern progressive authorities. If the California Court is right, the authorities heretofore cited to the contrary notwithstanding, this Court should also speak on the matter to properly supervise the proceedings that may occur in the Federal Courts in event of the adoption of this rule.

The need for such an authoritative adjudication on the matter is clearly stated by the California Supreme Court in a later decision on the subject of the interpretation to be accorded the right of confrontation under the decisions of this Court. In *In re Hill*, 71 A.C. 1039, 80 Cal. Rptr. 537, 458 P. 2d 449, in discussing the rule announced in *Bruton, supra*, and in holding that it should even be extended to a situation where the extrajudicially confessing codefendant takes the stand and is subject to cross-examination, the court said:

"Nor are we persuaded to the contrary by the recent case of *Harrington v. California* (1969) 395 U.S. 250 [23 L.Ed.2d 284, 89 S.Ct. —].

There each of Harrington's three codefendants confessed and each confession was introduced at their joint trial with limiting instructions. One of the confessing codefendants also took the stand and was cross-examined by the defendant's counsel. The Supreme Court characterized the question before it to be whether the Bruton error in the admission of the confessions of the two co-defendants who did not take the stand was harmless under *Chapman v. California*, (1967) 386 U.S. 81 [7 L.Ed.2d 705, 87 S.Ct. 824]. How-

ever, the court did not deal with the question of whether there was Bruton error in the admission of the confession of the codefendant who did testify. Nothing in the court's opinion indicates that it felt that the admission of such confession was not error under Bruton and its failure to treat the issue indicates nothing more than that it was not raised by counsel. We do not draw any inferences from Harrington which would cause us to hold in the instant case that the admission of Madorid's confession was not error because he took the stand and testified at trial. *Until such time as the Supreme Court affirmatively indicates that cross-examination of the confessing codefendant at trial is adequate under the confrontation clause, we feel compelled to hold that the admission of his confession is constitutional error of the type condemned by Bruton.*" (Emphasis added.)

It is submitted that the need for an authoritative adjudication on the matter by this Honorable Court is clear.

This Court has recognized, and has consistently refused to abdicate its obligation; particularly in the exercise of the supervisory power over the federal courts; to decide questions involving federal Constitutional issues in order that the lower federal courts and the courts and Legislatures of the various states may conform their behavior to the commands of the Constitution.

Petitioner submits that the California Supreme Court's decisions present a question requiring a Constitutional decision from this Court on a question of

importance not only to the State of California but to the other states and the federal courts. The guide lines given to California will aid those throughout the nation who strive for the proper development of rules for the administration of justice in our courts.

Inasmuch as the holding of the California Supreme Court is not in accord with this Court's decisions that holding should be reversed and guidance given thereby to the authorities, state and federal, engaged in promulgating rules of evidence.

Conclusion.

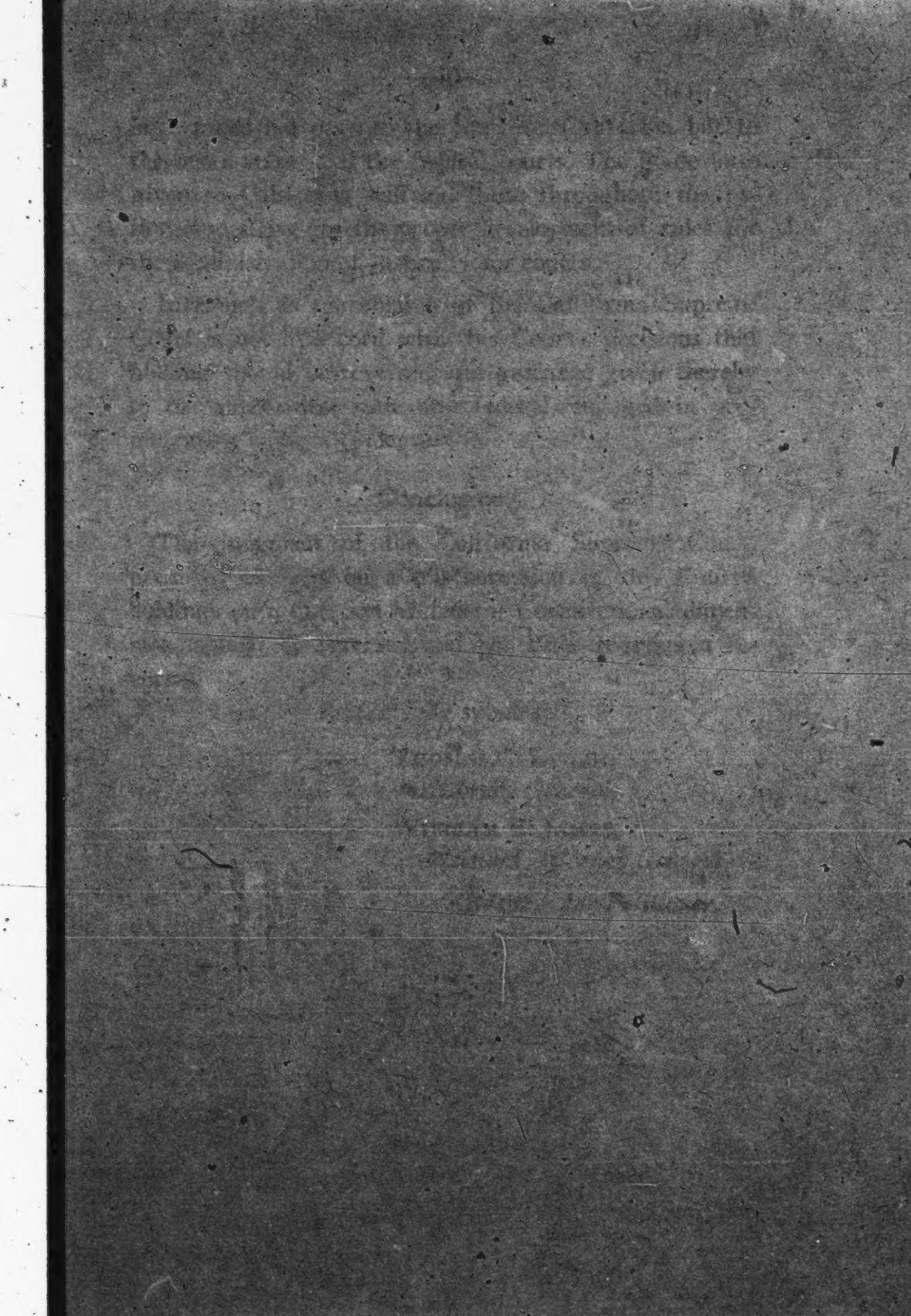
The judgment of the California Supreme Court, premised as it is on a misconception of this Court's holdings on a question of federal Constitutional dimension, should be reversed and petitioner requests a reversal.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved.

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code section 770.

§770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless :

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code section 1235.

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1965, c. 299, § 1235.)

California Health and Safety Code section 11532.

§ 11532. Every person of the age of 21 years or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale or peddling any marijuana, or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any marijuana to a minor, or who induces a minor to use marijuana in violation of law, is guilty of a felony punishable by imprisonment in the state prison from 10 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

If such a person has been previously convicted once of any felony offense described in this division or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previ-

ous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison.

If such a person has been previously convicted two or more times of any felony offense described in this division or has been previously convicted two or more times of any offense under the laws of any other state, or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 15 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 15 years in prison.

(Added by Stats. 1959, Ch. 1112; amended by Stats. 1961, Ch. 274.)



INDEX

	Page
Opinion below-----	1
Jurisdiction-----	2
Question presented-----	2
Constitutional provisions and statutes involved-----	2
Interest of the United States-----	2
Statement-----	3
Argument:	
I. Introduction and Summary-----	6
II. Admission of the prior inconsistent statements of a witness exposed to cross-examination at trial would not offend the common understanding of the right to "confrontation" at the enactment of the Bill of Rights-----	8
III. This court's cases recognize the limited nature of the right to be confronted and its inapplicability to the prior statement of a witness available for cross-examination at trial-----	15
IV. Fairness permits evidentiary use of a witness' prior statement at trial, where the prosecution is not implicated in the witness' failure to make the statement at trial and the accused has an unimpeded opportunity for cross-examination-----	24
Conclusion-----	32

CITATIONS

Cases:

<i>Barber v. Page</i> , 390 U.S. 719-----	17, 18, 19, 25
<i>Bridges v. Wixon</i> , 326 U.S. 135-----	21, 22, 28, 31
<i>Brookhart v. Janis</i> , 384 U.S. 1-----	17
<i>Bruton v. United States</i> , 391 U.S. 123-----	17, 20, 22, 29, 30, 31
<i>California v. Johnson</i> , 68 Cal. 2d 646, 441 P. 2d 111, certiorari denied, 393 U.S. 1051-----	5, 32
<i>Costello v. United States</i> , 350 U.S. 359-----	16
<i>DiCarlo v. United States</i> , 6 F. 2d 364-----	25
<i>Douglas v. Alabama</i> , 380 U.S. 415-----	19, 20, 29, 30
<i>Dowdell v. United States</i> , 221 U.S. 325-----	17
<i>Fenwick's Trial</i> , 13 Howell St. Tr. 538-----	13

Cases—Continued	Page
<i>Ferguson v. Georgia</i> , 365 U.S. 570	24
<i>Gilbert v. California</i> , 388 U.S. 263	21
<i>Gillars v. United States</i> , 182 F. 2d 962	23, 24
<i>Green v. Bomar</i> , 329 F. 2d 796, vacated on other grounds, 379 U.S. 358	16
<i>Greene v. McElroy</i> , 360 U.S. 474	17
<i>Hickory v. United States</i> , 151 U.S. 303	21
<i>Kay v. United States</i> , 255 F. 2d 476, certiorari denied, 358 U.S. 825	21
<i>Kirby v. United States</i> , 174 U.S. 47	17
<i>Mattox v. United States</i> , 146 U.S. 140	7, 15
<i>Mattox v. United States</i> , 156 U.S. 237	15,
	16, 17, 19, 26, 28, 30
<i>Moore v. United States</i> , 348 U.S. 966, reversing per curiam, 217 F. 2d 428	23
<i>Motes v. United States</i> , 178 U.S. 458	17, 18, 25
<i>O'Neil v. Nelson</i> , No. 23,149 (C.A. 9), decided January 26, 1970	31
<i>Palmer v. Hoffman</i> , 318 U.S. 109	23
<i>Parker v. Bladden</i> , 385 U.S. 363	7, 16
<i>Pointer v. Texas</i> , 380 U.S. 400	17, 18, 19, 20
<i>Reynolds v. United States</i> , 98 U.S. 145	18
<i>Salinger v. United States</i> , 372 U.S. 542	23
<i>Santoro v. United States</i> , 402 F. 2d 920	20
<i>Sibron v. New York</i> , 392 U.S. 40	6
<i>Smith v. Illinois</i> , 390 U.S. 129	19
<i>Snyder v. Massachusetts</i> , 291 U.S. 97	15, 16, 17
<i>Southern Railway Co. v. Gray</i> , 241 U.S. 333	21
<i>Stein v. New York</i> , 346 U.S. 156	17
<i>Townsend v. Henderson</i> , 405 F. 2d 324	31
<i>Turner v. Louisiana</i> , 379 U.S. 466	16
<i>United States v. Anderson</i> , 406 F. 2d 719, certiorari denied, 395 U.S. 967	21
<i>United States v. Ballentine</i> , 410 F. 2d 375, certiorari denied, No. 488 Misc., O.T. 1969, certiorari denied, February 24, 1970	20, 31
<i>United States v. Boone</i> , 401 F. 2d 659, certiorari denied, <i>sub nom. Jackson v. United States</i> , 394 U.S. 933	21
<i>United States v. DeSisto</i> , 329 F. 2d 929, certiorari denied, 377 U.S. 979	2, 25
<i>United States v. Holmes</i> , 387 F. 2d 781, certiorari denied, 391 U.S. 936	23

Cases—Continued

	Page
<i>United States v. Johnson</i> , 129 F. 2d 954, affirmed 318 U.S. 189	16
<i>United States v. Leathers</i> , 135 F. 2d 507	23
<i>Washington v. Texas</i> , 388 U.S. 14	24
<i>West v. Louisiana</i> , 194 U.S. 258	19
<i>Wilcoxon v. United States</i> , 231 F. 2d 384, certiorari denied, 351 U.S. 943	23
 Constitution, statutes and rules:	
Sixth Amendment, Confrontation Clause	2
	3, 5, 6, 8, 9, 14, 15, 19, 20
Fourteenth Amendment	2, 5
28 U.S.C. 1732 and 1733	23
1 & 2 Phil. & Mary c. 13	10
2 & 3 Phil. & Mary c. 10	10
California Evidence Code, Sections 770 and 1235	2, 3
14 D.C. Code 101, 102	23
Virginia Declaration of Rights (1776)	6
F.R. Crim. P.:	
Rule 26	23
Rule 27	23
Rule 54(c)	23
Proposed Rules of Evidence for the United States District Courts and Magistrates (1969), Rule 8-01(c)(2)	3, 24
Uniform Rules of Evidence, Rule 63(1)	24
 Miscellaneous:	
ALI, <i>Model Code of Evidence</i> , Rule 503(b)	24
Blackstone, <i>Commentaries</i> , Book III, Ch. 23	13, 14
Dumbauld, <i>The Bill of Rights</i> , 33 (1957)	6
Falknor, <i>The Hearsay Rule and Its Exceptions</i> , 2 U.C.L.A. L. Rev. 43 (1954)	24
Heller, <i>The Sixth Amendment</i> , Chap. II (1951)	6, 11
Holdsworth, <i>History of the English Law</i> , Vol. IX (1926)	9, 10, 11, 12
Maguire, <i>Evidence: Common Sense and Common Law</i> (1947)	24, 28
McCormick, <i>The Turncoat Witness; Previous Statements as Substantive Evidence</i> , 25 Texas L. Rev. 573 (1947)	24, 28
Morgan, <i>Hearsay Dangers and the Application of the Hearsay Concept</i> , 62 Harv. L. Rev. 177 (1948)	9, 24, 27
Morgan, <i>The Hearsay Rule</i> , 12 Wash. L. Rev. 1 (1937)	9

Miscellaneous—Continued

	Page
Note, <i>Confrontation and the Hearsay Rule</i> , 75 Yale L.J. 1434 (1966)	26
Note, <i>Preserving the Right to Confrontation</i> , * * * 113 U. Pa. L. Rev. 741 (1965)	6
Rutland, <i>The Birth of the Bill of Rights</i> (1955)	6
Stephen, <i>A History of the Criminal Law of England</i> , Vol. 1 (1883)	9, 10, 11, 12
Weinstein, <i>Probative Force of Hearsay</i> , 46 Iowa L. Rev. 331 (1961)	24
Wigmore, <i>Evidence</i> (3d ed. 1940):	
§ 1018	18, 21, 24
§ 1364	9, 14
§§ 1397-1398	14
§§ 1420-1503	14
§§ 1815-1818	24

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 387

STATE OF CALIFORNIA, PETITIONER

v.

JOHN ANTHONY GREEN

~~ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA~~

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court (A. 104) is reported at 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422.

JURISDICTION

The judgment of the California Supreme Court was entered on March 21, 1969. By an order of June 18, 1969, Mr. Justice Brennan extended the time for filing the petition for a writ of certiorari to July 11, 1969, and by order of July 15, 1969, on a timely motion for further extension, Mr. Justice Marshall extended the time for filing to July 25, 1969. The case was docketed on that date. The Court granted the

petition for a writ of certiorari January 12, 1970 (A. 119). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the defendant's right to be confronted with adverse witnesses in a criminal trial, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution, forbids the evidentiary use at trial of a witness' prior statements, where the witness admits at trial that he made the statements and is subject to unrestricted cross-examination regarding them,

- (1) when the prior statement was sworn and subject to cross-examination when made;
- (2) when the prior statement was neither sworn nor subject to cross-examination when made.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments to the Constitution and Sections 770 and 1235 of the California Evidence Code (which permit evidentiary use of prior statements in the circumstances described in the Question Presented) are set out in the Appendix to Petitioner's Opening Brief.

INTEREST OF THE UNITED STATES

Although no present federal statute makes prior inconsistent statements of witnesses admissible for the truth of their content, and all the federal circuits save one¹ presently follow a rule that such prior statements

¹ *United States v. DeSisto*, 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979, represents the exception. *DeSisto* held that a prior inconsistent statement given under oath could be introduced as substantive evidence.

are admissible only for purposes of impeachment, the United States has an important interest to defend the right of Congress to modify these rules for the future. If the Confrontation Clause of the Sixth Amendment to the Constitution renders the California statute in this case unconstitutional, the ability of Congress and State legislatures (and courts) to modify rules of evidence in criminal trials, particularly with respect to hearsay, appears to be highly limited.

Our concern that Congress not be unduly restricted is increased by the pendency of the Proposed Rules of Evidence for the United States District Courts and Magistrates, promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1969). Among the recommendations of the committee, which for the most part codify present law, is a provision making any prior inconsistent statement of a witness admissible as affirmative evidence (Rule 8-01(c)(2)(i)). This provision is virtually identical with the California statute here at issue.

STATEMENT

The United States relies, in the main, upon the statement of facts set out in petitioner's opening brief, pp. 3-8. To clarify certain aspects of its presentation, however, the following brief summary is submitted:

A major prosecution witness, one Porter, testified at petitioner's trial for furnishing a narcotic (marijuana) to a minor that he did not recall whether it was petitioner Green who had furnished the narcotic to him (A. 7-8). At that point, and through the subsequent testimony of Officer Wade, the state

sought to prove two prior statements by Porter that it was Green who had supplied him with the marijuana.

The first of these statements constituted Porter's testimony at a preliminary hearing, under oath and subject to cross-examination, that Green had been his supplier (A. 8-10; 18-22). At the trial, Porter said he didn't remember how he had testified at the preliminary hearing, but that he had done so and that he believed his statements at that hearing were the truth as he then believed it (A. 11, 20).

The second of these statements constituted Porter's conversation with Officer Wade, neither under oath nor subject to cross-examination, at the Los Angeles Police Juvenile Division Headquarters. Relating this statement at the trial, Officer Wade testified that Porter told him that Green had been his supplier for a kilo of marijuana (A. 87). Porter was recalled after Officer Wade's testimony, and admitted talking to Wade, that he might have told him about Green, and that he believed he was telling the truth at that time (A. 58-60).

Both prior statements were admitted into evidence as part of the prosecution's affirmative proof of guilt. Unless it might be thought that they were adopted by Porter at trial during the course of his examination and cross-examination, the prior statements constituted the only direct proof that Green was the person who had supplied Porter with marijuana—the offense with which he was charged. Other testimony, however, showed an association between Porter and respondent

in an apparent but abortive attempt to sell drugs to an undercover officer (A. 48-53).

On appeal to the state courts, the state treated the two statements differently. The California Supreme Court had earlier decided that a statement of the type made to Officer Wade could not be given affirmative use under the Confrontation Clause of the federal Constitution, as applied to the states through the Fourteenth Amendment, even though the declarant was subject to cross-examination at the trial itself. *California v. Johnson*, 68 Cal. 2d 646, 441 P. 2d 111, certiorari denied, 393 U.S. 1051. The state accordingly conceded that, under *Johnson*, error had occurred with respect to Officer Wade's testimony, but urged that error as harmless. The principal subject of argument below was the second statement. In *Johnson*, the California court had reserved judgment whether a statement of the type Porter made at the preliminary hearing—under oath and subject when made to cross-examination—could be given affirmative use consistent with the Sixth Amendment. In this case, the state court held that its use, too, was barred.

We have no doubt that this Court can and should reach both aspects of the problem. *Johnson* was decided on federal constitutional grounds which have not previously been considered in this Court. In these circumstances, while the state's concession may have been required by its respect for the prior decisions of the state court, it can hardly be binding here. In somewhat similar circumstances, this Court has noted its "obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits

them to conform their future behavior to the demands of the Constitution." *Sibron v. New York*, 392 U.S. 40, 59. We argue within that the proper constitutional resolution here is that affirmative use of *any* prior statement is constitutionally permissible, so long as the declarant is available for effective cross-examination at trial. If that argument is accepted, it follows that the case which prompted the concession was incorrectly decided and the concession, accordingly, may be disregarded.

ARGUMENT

I. INTRODUCTION AND SUMMARY

The Sixth Amendment to the Constitution of the United States guarantees to the accused in all criminal prosecutions the right "to be confronted with the witnesses against him." At its adoption, that phrase appears to have been thought so clear that it required no explanation; all that is known is that the Confrontation Clause was part of Madison's twelve proposed constitutional amendments and that it was passed without discussion. See Dumbauld, *The Bill of Rights*, 33-49, 53-54 (1957); see generally Rutland, *The Birth of the Bill of Rights* (1955);² cf. Note, *Preserving the Right to Confrontation* * * *,

² Rutland indicates that Madison "had leaned heavily" on the Virginia Declaration of Rights (1776) in drafting the amendments. Rutland, *op. cit.* at 202. The Virginia Declaration contained a provision that in all criminal prosecutions a "man hath a right * * * to be confronted with the accusers and witnesses." *Id.* at 232. This may well be the constitutional source of the specific term "confronted." See also Heller, *The Sixth Amendment*, Chapter II (1951).

113 U. Pa. L. Rev. 741, 743 (1965). Yet a simple meaning today appears beyond reach. At its most elemental, the clause requires that all the evidence submitted to the fact-finder be submitted in open court, during trial, with the accused having the opportunity to attend. *Parker v. Gladden*, 385 U.S. 363. But that has never been all. It has been linked as well with values requiring face-to-face accusation, an opportunity for the fact-finder to observe demeanor, the solemnity of an oath, an opportunity for the accused to test by cross-examination, and a sense that the prosecution must expose its case to adversary challenge to the maximum possible degree. Nonetheless, these values have rarely been made absolute; where necessity requires and trustworthiness permits, as in the case of "dying declarations," evidence is admitted at criminal trials which may satisfy only the last of them—that the prosecution has come forward with the best evidence it can produce. E.g., *Mattox v. United States*, 146 U.S. 140.

We start from the premise that the criminal trial is primarily a search for truth, within the context of a constitutional commitment to a particular mode of finding that truth, the adversary trial. Where circumstances for which the prosecution cannot be held responsible prevent the personal presentation of evidence, the search for truth is hindered, not aided, by the exclusion of trustworthy evidence available in another form. That hindrance is justified only if the circumstances are such as to prevent the accused from fairly testing the proffered evidence and the fact-finder from fairly measuring its worth in the adver-

8

sary process. In the circumstances of this case, the prosecution cannot be charged with Porter's failure to repeat on the stand the statements he made at the preliminary examination, and to Officer Wade. Since the witness freely admitted making the prior statements, subjecting himself to searching examination of the variances thus exposed, adversary challenge was fully possible and the fact-finder was in a position fairly to judge the truth of the matter. Exclusion of this evidence would impede the search for truth, yet, while it might in fact make conviction less likely, would vindicate no substantial interest of the accused.

II. ADMISSION OF THE PRIOR INCONSISTENT STATEMENTS
OF A WITNESS EXPOSED TO CROSS EXAMINATION AT TRIAL
WOULD NOT OFFEND THE COMMON UNDERSTANDING OF
THE RIGHT TO "CONFRONTATION" AT THE ENACTMENT
OF THE BILL OF RIGHTS

Since the documentary records of the proceedings leading to the adoption of the Bill of Rights give no indication of the precise nature of the rights thought to be secured by the Confrontation Clause, the historical setting of the right to "confrontation" is particularly important. Examination of that setting leads to the conclusion that it was particularly linked with the presence of witnesses at trial, and the attendant privilege of cross-examination, under oath, before the body responsible for the finding of innocence or guilt. As such, it is intertwined with the origin and development of the hearsay rules of evidence in England—rules which evidenced the same links and tended toward the same ends. The story has been told well by

legal scholars and its details need not be repeated here. See Wigmore, *Evidence* § 1364 (3d ed. 1940) (hereinafter Wigmore); Holdsworth, *History of the English Law*, Vol. IX, pp. 177-187, 214-219, 222-236 (1926); Stephen, *A History of the Criminal Law of England*, Vol. I, 216-233, 324-427 (1883); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 179-183 (1948); Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937); see also Note, *Preserving the Right to Confrontation* * * *, 113 U. Pa. L. Rev. 741, 744-745 (1965).

It is helpful, however, to view the procedures from which the claim to confrontation developed. As Holdsworth describes the state of criminal procedure in England towards the end of the sixteenth century, it was almost exactly the reverse of the Sixth Amendment in every detail:

* * * Thus, as under the old law, persons accused of treason or felony were denied the help of counsel, and they were refused a copy of the indictment. The law as to oral evidence was * * * very new. Though the crown was beginning to call witnesses, there was no clear rule that the prisoner could call them * * *. [H]e was at first refused this right; and when, at the beginning of the seventeenth century, this refusal began to shock public opinion, the illogical expedient was adopted of allowing him to call them and refusing to allow them to be sworn. Similarly, the absence of clear rules as to the admissibility of evidence and as to the conduct of a trial, were used to give advantages to the crown. The witnesses were not confronted

with the prisoner, * * * and the prisoner himself was closely questioned by the examining magistrate, the judge at trial, and the prosecuting counsel. * * * [T]he privilege of refusing to answer incriminating questions was only established for witnesses at the end of this period; and, even then, it had hardly been extended to the prisoner himself. [*Op. cit. supra*, Vol. IX, p. 224.]

Particularly relevant for present purposes was the function of the examining magistrate, which made possible the denial of confrontation at trial. Statutes enacted in 1554 and 1555 (1 & 2 Phil. & Mary c. 13; 2 & 3 Phil. & Mary c. 10) directed magistrates to interview and take the depositions of all witnesses to felonies;³ this examination "was intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." Stephen, *op. cit. supra*, Vol I, p. 221 (1883). They were, however, commonly introduced into evidence against him at trial.

The claim to confrontation developed in response to defendants' overwhelming disadvantage at trial. Through the depositions which they had secured, prosecutors would be able to present what was to them a carefully rehearsed scenario. As we have seen, the

³ Misdemeanors were under the jurisdiction of the Star Chamber, which followed essentially similar procedures with regard to witnesses as those described in the text, on affidavit. Stephen, *A History of the Criminal Law of England*, Vol I, p. 338 (1883).

defendant had little or no warning of the prosecution's case and had no counsel present to assist him. Just because of this, however, he was usually permitted to interrupt the prosecution freely, and to contest each point as it was brought out.

* * * [T]he trial became a series of excited altercations between the prisoner and the different counsel opposed to him. * * * [T]hey questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning. * * * As the argument proceeded the counsel would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.* the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions. [*id.*, 325-326; see also 346-350; 376-377; Holdsworth, *op. cit. supra*, Vol. IX, 225-228.]

The depositions secured by the examining magistrates, in other words, were often the principal "evidence" at trial; defendants clamored for the deponents' presence, not to be able to exclude what they had earlier said, but in order to tussle with them face-to-face and thus perhaps convince the jury of the justice of their cause.

The trial of Sir Walter Raleigh for treason in 1603—described by one author as well-known to those who wrote the Confrontation Clause*—is illustrative.

* Heller, *The Sixth Amendment* 104 (1951).

A crucial element of the evidence against him consisted of the deposition of one Cobham and a letter which Cobham wrote thereafter, both by indirection implicating Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham, and believed that Cobham would now testify in his favor; there was a lengthy dispute over Raleigh's right to have Cobham called as a witness. Cobham was not called; although it seems to have been conceded that he was available to be called; and Raleigh was convicted. Stephen, *op. cit. supra*, Vol. I, pp. 333-336; Holdsworth, *op. cit. supra*, Vol. IX, pp. 216-217, 226-228. Again, so far as appears, the objection in Raleigh's case and other similar cases was not that the depositions were received as evidence, but that the witnesses were not called for the defendant to confront them and perhaps elicit another story. The prosecution's objection to Raleigh's claim was not that it would be prevented from using the deposition as documentary evidence, but that the jury might be inveigled should Cobham appear and, under oath, give a new version possibly influenced by "favour or fear," *id.* at 217 n. 2.

During the century that followed, through the domestic political upheaval which characterized it, most of the rights embodied in our Bill of Rights took shape in English practice. In particular, as use of oral witnesses became more common and the risks of permitting the State to introduce untested depositions or affidavits became more apparent, "confrontation" matured from a claim by defendants (that probably

served to alert juries to those risks) to a right to have adverse witnesses present for "face-to-face" encounter, except in special circumstances such as death of the witness or the defendant's procuring of his absence. By 1696, counsel were able to argue to—and almost to persuade—a Parliament considering a bill of attainder that, absent the witness, his deposition should not be let in. *Fenwick's Trial*, 13 Howell's St. Tr. 538, 591 ff., 638, 712, 750.

Hearsay rules developed at about the same time, and in response to at least some of the same pressures as molded the right to confrontation. Since hearsay rules applied to *all* parties, and to civil as well as criminal proceedings, there were not the same considerations of fairness to defendants or of reaction to the excesses of political trials as contributed to the pressure for recognition of the confrontation right. But with the growing use of oral testimony in ordinary trials and the recognition that juries could no longer—and should no longer—decide cases on the basis of what they learned out of court, it was nonetheless necessary to develop rules governing what information the jury should receive in order most accurately to assess the truth; and in this respect, there were undoubtedly shared judgments.

By requiring a party to bring forward the witness himself, and not one who would say what he had heard a witness say, it would be more certain that the best possible evidence would be produced (*Blackstone, Commentaries*, Book III, Ch. 23, p. 368); production of a witness rather than his deposition avoids inter-

pulation—careless or otherwise—by the scribe, impresses the seriousness of the occasion upon him, and, through cross-examination, assures a vigorous and thorough sifting of the truth and of the witness' worth (*Id.*, at 373-374). Even before the beginning of the eighteenth century, such considerations had led to the recognition that hearsay was entitled to lesser weight than evidence given *viva voce*, and deserved to be limited to use as corroboration. By the beginning of the eighteenth century, the rule had taken its present contours; in general, hearsay was inadmissible upon objection, but exceptions were recognized for situations such as the dying declaration and the statement against interest, where the law's concerns with "best evidence" and trustworthiness were thought to be satisfied. See Wigmore, *supra*, §§ 1364, 1397-1398, 1420-1503.

In assessing what the drafters of the Sixth Amendment might have meant in protecting the right "to be confronted," these common points must be taken into account. Both developments share the judgment that, absent necessity and some indication of trustworthiness, parties to litigation—and more particularly the prosecution—must present their evidence by witnesses at trial, where they will be subject to exposure to the jury and cross-examination on their testimony by the opposite side. The drafters of the Sixth Amendment were undoubtedly as aware of these similarities and the "best evidence" and trustworthiness functions they served, Blackstone, *supra*, as of the rigors of the criminal and political trials which had

led, in particular, to the elaboration of the confrontation right. But, as this Court has previously recognized, *Snyder v. Massachusetts*, 291 U.S. 97, 107, it would be excessive to hold that they made the rules against hearsay a matter of constitutional right. The right to be confronted, like the other rights guaranteed by the Sixth Amendment, was born of cruder wrongs. As we have shown, it was simply the right to have the witnesses present at trial (subject to the exceptions for necessity, not here relevant) where they could be observed, challenged, and tested by cross-examination; so long as that was done, there is no reason to believe that the privilege of confrontation encompassed a right to have excluded from evidence what a witness may have said on a previous occasion, if that could be proved.

III. THIS COURT'S CASES RECOGNIZE THE LIMITED NATURE OF THE RIGHT TO BE CONFRONTED AND ITS INAPPLICABILITY TO THE PRIOR STATEMENT OF A WITNESS AVAILABLE FOR CROSS-EXAMINATION AT TRIAL

Cases in this Court have consistently identified confrontation as a right to have witnesses presented at trial for observation and cross-examination—but without either making that right absolute or limiting the evidence to be received of a witness who was so presented. Thus, the passage most frequently quoted to describe the right arose in a case in which this Court twice recognized exceptions to it, *Mattox v. United States*, 146 U.S. 140, 151 (dying declaration); 156 U.S. 237, 240-244 (prior testimony of a witness since deceased):

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. * * * [15 U.S. at 242-243].

The right has sometimes been described in the very fundamental terms of assuring that a jury is to decide a case on the basis only of the evidence put before it in open court. *Turner v. Louisiana*, 379 U.S. 466, 472-473; *Parker v. Gladden*, 385 U.S. 363. Most often, however, it has been identified as a right to the presence and cross-examination of adverse witnesses at trial,⁵ subject to exceptions for necessity such as

⁵ In *Snyder v. Massachusetts*, 291 U.S. 97, the Court indicated that the right to confrontation is applicable only to the reception of evidence at the trial, and implies no general right to be present at other stages of the trial—in that case, a view of the scene of the crime. See, to the same effect (by implication) *Costello v. United States*, 350 U.S. 359; see also *Green v. Bomar*, 329 F. 2d 796 (C.A. 6) (right to confrontation not infringed by denial of a preliminary hearing), vacated on other grounds, 379 U.S. 358; *United States v. Johnson*, 129 F. 2d 954 (C.A. 3) (right to confrontation not violated by exclusion of defendant from courtroom during argument on question of law), affirmed, 318 U.S. 189.

were recognized in *Mattox*.⁶ E.g., *Dowdell v. United States*, 221 U.S. 325, 330; *Snyder v. Massachusetts*, 291 U.S. 97, 107; *Greene v. McElroy*, 360 U.S. 474, 496-499; *Brookhart v. Janis*, 384 U.S. 1, 3-4; *Bruton v. United States*, 391 U.S. 123, 126.

In general, the cases in which this Court has found a violation of the Confrontation Clause have involved either a failure to produce the declarant, or some other frustration of or impediment to cross-examination. Thus, in *Kirby v. United States*, 174 U.S. 47, the Government sought to prove an element of the offense of receiving stolen postal property—that the property was in fact stolen—merely by showing the convictions of three other persons for the offense of theft. This Court held [*id.* at 55]:

[A] fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for

⁶ Since in cases like the present the witness, by hypothesis, is called and available for cross-examination, there is no need to discuss at length these exceptions, under which cross-examination at trial is foregone for reasons of necessity. The issue generally put in such cases is whether there exists a true necessity for admitting the evidence, e.g., *Motes v. United States*, 178 U.S. 458; *Barber v. Page*, 390 U.S. 719, and whether the circumstances in which the prior statement was obtained render it sufficiently trustworthy to be admitted without present cross-examination, *Mattox, supra*. Even in that context—the unavailability of cross-examination at trial—this Court has reiterated that the exceptions are not static or tied to hearsay rules. *Snyder v. Massachusetts*, 291 U.S. 97, 107; *Stein v. New York*, 346 U.S. 156, 196; *Pointer v. Texas*, 380 U.S. 400, 407. But the present case involves a separate issue, since the witness was present and available for unimpeded cross-examination.

which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach * * *.

In *Motes v. United States*, 178 U.S. 458, the Government was held responsible for its failure to produce a witness, and thus not permitted to introduce his prior testimony under a claim of necessity. Compare *Reynolds v. United States*, 98 U.S. 145, 158–159. In *Pointer v. Texas*, 380 U.S. 400, a witness who had not been subject to cross-examination when he made the statement sought to be introduced was unavailable at trial.

Barber v. Page, 390 U.S. 719, clearly established that the right to be confronted relates to a witness' presence at trial and the possibility of cross-examining him there, rather than what might have happened at an earlier stage. There, as in *Pointer*, the declarant was not produced at trial; but, in *Barber*, he could have been cross-examined at the preliminary hearing where he made the statement sought to be introduced. As it had in *Motes, supra*, this Court refused to consider the adequacy of that prior opportunity once it determined that the prosecution could have taken further steps to secure the witness' presence at the trial:

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching ex-

ploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case. [390 U.S. at 725-726.]

Compare *West v. Louisiana*, 194 U.S. 258; *Smith v. Illinois*, 390 U.S. 129.

Indeed, in two of its most prominent, recent cases of this type, this Court has assumed that introduction of a witness' prior statement would *not* offend the Confrontation Clause if adequate cross-examination were possible at trial. Thus, in *Douglas v. Alabama*, 380 U.S. 415, this Court reversed a conviction secured when the prosecution, through purported cross-examination, read into the record an alleged confession of the defendant's supposed accomplice, Loyd, where Loyd refused to testify on self-incrimination grounds. After emphasizing that the "primary interest secured by [the Confrontation Clause] is the right of cross-examination," and quoting the passage from *Mattox*, *supra*, p. 16, 380 U.S. at 418-419, the Court held (*id.* at 419-420):

In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation

Clause. * * * Loyd could not be cross-examined on a statement imputed to but not admitted by him. * * *

Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. [Emphasis added.]

Nor does it appear that the emphasized passage was unimportant *dictum*; it was repeated at a crucial point in the reasoning of *Bruton v. United States*, 391 U.S. 123. That case held that it was a violation of the Sixth Amendment right "to be confronted" to introduce a co-defendant's confession implicating an accused, where the co-defendant did not testify; relying on *Douglas* to reach that holding, this Court quoted the emphasized passage as the core of its reasoning. 391 U.S. at 127. And it indicated that if Bruton's co-defendant had in fact taken the stand, the evidence of his confession—a prior statement—would have been "subject to cross-examination," *id.* at 128, and hence admissible without affront to the Confrontation Clause.⁷ Several courts of appeals have followed that suggestion in finding no denial of confrontation with respect to a co-defendant's confessions implicating another where the co-defendant does take the stand and testify. *Santoro v. United States*, 402 F.2d 920 (C.A. 9); *United States v. Ballentine*, 410 F.2d 375 (C.A. 2), certiorari denied, No. 488 Misc., O.T. 1969,

⁷ The Court carefully noted that hearsay, as distinct from confrontation, problems were not presented since the confession was admissible against the declarant, a codefendant. *Ibid.*, n. 3.

February 24, 1970; *United States v. Boone*, 401 F.2d 659, 663 (C.A. 3), certiorari denied *sub nom. Jackson v. United States*, 394 U.S. 933.⁸

The sole possible deviation in this Court's cases is *Bridges v. Wixon*, 326 U.S. 135. In two earlier cases, this Court had adopted as a matter of evidentiary law, under the hearsay rule, what Wigmore terms the "orthodox rule" (*op. cit. supra*, § 1018) that prior inconsistent statements are admissible only for impeachment purposes. *Hickory v. United States*, 151 U.S. 303, 309; *Southern Railway Co. v. Gray*, 241 U.S. 333, 337. But the hearsay rule may be altered by statute, as California sought to do here, unless the effect is to deny confrontation or some other constitutional right. Neither of these cases found any such denial. *Bridges*, however, could be read as affording the rule constitutional force. There, a witness, one O'Neil, allegedly had at one time stated to investigating officers that he had seen Bridges engage in activities

⁸ The same conclusion may be reached with respect to other, established practices. Thus, there is no valid confrontation objection to introducing evidence that a witness had identified the accused as the culprit at some point before trial, even if the witness is unable to identify him in the courtroom. *United States v. Anderson*, 406 F.2d 719 (C.A. 4), certiorari denied, 395 U.S. 967; see also *Gilbert v. California*, 388 U.S. 263, 272-273, n. 3. And where the prosecution's evidence includes the physical analysis of some substance, for example of blood for alcoholic content in connection with a drunken driving charge, it is permissible to introduce the written report of that analysis, another prior statement, together with the oral testimony of the analyst without offending the Confrontation Clause. E.g., *Kay v. United States*, 255 F.2d 476, 480-481 (C.A. 4), certiorari denied, 358 U.S. 825.

demonstrating Communist party membership. At a deportation hearing, he admitted making statements to the officers and that those statements were true, but he denied that in his statements he had said anything about Bridges' Communist activity. The prior statements were proved, *inter alia*, by stenographic report, and this Court held that reliance upon them was error:

The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 U.S. 303, 309 * * *. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded. * * * [326 U.S. at 153-154.]

So far as we are aware, the latter part of this quotation had no precedent and has never since been repeated by this Court. The fault it suggests is not violation of the right to confrontation, but offense to rather amorphous concepts of fairness or due process, not susceptible of ready definition. To the extent this Court has recognized that juries may not be equal to the complex task of using evidence for one purpose but not another, e.g., *Bruton, supra*, it is evident that permitting impeachment use, in itself, permits the results the Court stated to be unfair. And it is plain that the law frequently permits unsworn evidence to be admitted against defendants in criminal trials—

whether prior identifications, dying declarations, business and official records, or the like.⁹ But in any event, if "unfairness" is the test, we believe that test is readily met in cases like this one. It is to that proposition that we now turn.

⁹ The constitutionality of such statutes as 28 U.S.C. 1732 and 1733 (made applicable to criminal trials by Rules 26 and 27, F.R. Crim. P.), which provide for the admissibility of certain types of business and official records has been sustained. See e.g. *United States v. Leathers*, 135 F. 2d 507, 511 (C.A. 2); *United States v. Holmes*, 387 F. 2d 781, 783-784 (C.A. 7), certiorari denied, 391 U.S. 936; cf. *Palmer v. Hoffman*, 318 U.S. 109; *Salinger v. United States*, 272 U.S. 542, 547-548.

There is no express statutory requirement that oaths be administered to witnesses in criminal cases in the federal courts outside the District of Columbia (compare, as to the District, *Gillars v. United States*, 182 F. 2d 962, 969-970; 14 D.C. Code 101). F.R. Crim. P. 26, provides only that:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

See also F.R. Crim. P. 54(c); *Moore v. United States*, 348 U.S. 966, reversing *per curiam*, 217 F. 2d 428 (C.A. 7); *Wilcoxon v. United States*, 231 F. 2d 384, 386-387 (C.A. 10), certiorari denied, 351 U.S. 943; *Gillars v. United States*, 182 F. 2d 962, 969-970 (C.A.D.C.); *Ferguson v. Georgia*, 365 U.S. 570; *Washington v. Texas*, 388 U.S. 14; Wigmore, §§ 1815-1818.

IV. FAIRNESS PERMITS EVIDENTIARY USE OF A WITNESS' PRIOR STATEMENT AT TRIAL, WHERE THE PROSECUTION IS NOT IMPLICATED IN THE WITNESS' FAILURE TO MAKE THE STATEMENT AT TRIAL AND THE ACCUSED HAS AN UNIMPEDED OPPORTUNITY FOR CROSS-EXAMINATION

Virtually all commentators who have discussed the issue conclude that a witness' prior statements should be permitted evidentiary weight at trial, so long as the witness is then available for effective cross-examination. *E.g.*, Wigmore, *op. cit. supra*, § 1018; ¹⁰ Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 195 (1948); Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 333 and n. 15 (1961); McCormick, *The Turncoat Witness; Previous Statements as Substantive Evidence*, 25 Texas L. Rev. 573 (1947); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. Rev. 43, 48-55 (1954); *Uniform Rules of Evidence*, Rule 63(1); ALI, *Model Code of Evidence*, Rule 503(b); *Proposed Rules of Evidence for the United States District Courts and Magistrates*, Rule 8-01(c)(2), pp. 163-167 (1969); but see Maguire, *Evidence: Common Sense and Com-*

¹⁰ Wigmore initially took the "orthodox" position that such evidence should be excluded, but subsequently was convinced that the "natural and correct" conclusion was to admit the statements as affirmative evidence. *Ibid.*, at n. 2.

mon Law 59-63 (1947).¹¹ To be sure, these comments are made in considering appropriate policies for the law of evidence as a whole, under the hearsay rubric, and often do not consider, as such, the constitutional issues this Court must resolve regarding the use of such statements against defendants in criminal trials. Yet their evident, and overriding, concern is for the accuracy and fairness of a fact-finding process committed to the adversary system for ascertaining truth and to cross-examination as an essential feature of that system. A procedure which satisfies that concern could not be said to violate constitutional requirements of fairness.

An initial consideration, it appears to us, is the undoubted duty of the prosecution to use its best efforts to produce evidence through the direct testimony of witnesses in court, at trial. No case of which we are aware has permitted the use of other types of testimony where such efforts have not been forthcoming, and in some, for example *Motes and Barber, supra*, the failure of the prosecution to exercise care and diligence has been central to the result. Indeed, one commentator has been led to suggest that in devising a constitutional rule of confrontation, as distinct from an evidentiary rule of hearsay, this Court should treat it as "a canon of prosecutorial behavior * * *

¹¹ There has been persuasive judicial criticism as well. See, e.g., *DiCarlo v. United States*, 6 F. 2d 364, 368 (C.A. 2, L. Hand, J.); *United States v. DeSisto*, 329 F. 2d 929, 933-934 (C.A. 2, Friendly, J.).

requir[ing] that the prosecutor make "a diligent, good-faith effort to produce witnesses to testify"—that he not make the testimony "less reliable than it might have been." Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1439 (1966). Where a witness is sworn and questioned, and only subsequently does the prosecutor seek to introduce a prior statement the witness made which is inconsistent with his testimony at trial, it is evident that such best efforts have been forthcoming.

Assuming the prosecutor has, as here, put forward his best efforts to secure in-court testimony, the question arises what considerations would justify further restrictions on his ability to produce a substitute. For as this Court early recognized:

[The] general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. * * * The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. [*Mattox, supra*, 156 U.S. at 243.]

The guide suggested in that case by the Court—that the Constitution is satisfied if the prisoner once has "the advantage * * * of seeing the witness face to face and of subjecting him to the ordeal of a cross-examination," *id.* at 244—is, we believe, met in a case like this, where the witness testifies in court and is subject to full cross-examination. It is met irrespective whether the prior statement was under oath or

subject to cross-examination when made. For even though the witness does not presently repeat that statement under oath, he is available for full examination on what the truth of the matter was, the issue the trial is meant to resolve.¹² Indeed, the defendant is under less of a disadvantage regarding a jury's¹³ accurate assessment of that truth than he would be

¹² As Professor Morgan has observed, where a witness testifies at trial:

* * * whether or not [he] at the time of the utterance was subject to all the conditions usually imposed upon witnesses should be immaterial, for the declarant is now present as a witness. If his prior statement is consistent with his present testimony, he now affirms it under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it. * * * If the witness testifies that all the statements he made were true, as in the *Bridges* case, then the only debatable question is whether he made the statement; and as to that the trier has all the witnesses before him, and has also the benefit of thorough cross-examination as to the facts which are the subject matter of the statement. * * * If he concedes that he made the statement but now swears that it wasn't true, the experience in human affairs which the average trier brings to a controversy will enable him to decide which story represents the truth in the light of all the facts. * * * In any of these situations Proponent is not asking Trier to rely upon the credibility of any one who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. * * * [*Op. cit. supra*, pp. 195-196.]

¹³ While respondent was tried to the court, having waived jury trial, the right to confrontation, historically and practically, relates principally to the jury's role as fact-finder, and this discussion is therefore couched in terms of that role.

in the *Mattox* circumstances, where the evidence and cross-examination of a deceased witness is read to the jury from the cold record. The necessity to the prosecution is as great in this case as it was in *Mattox*, for if it cannot introduce the evidence of what the witness previously said, it cannot put its adversary view of the truth before the jury.

In order to justify entrusting an evidentiary matter to the jury, one must be sure the jury can reliably assess it. Perhaps it was doubts on this issue which led the Court to remark in *Bridges v. Wixon, supra*, that reliance on prior, unsworn statements would be unfair. Indeed, the argument against the view espoused in this brief rests in large part on the danger of manipulation of out-of-court statements, particularly where the statements are taken in private, with neither oath nor judicial presence to solemnize them. *Maguire, op cit. supra*, 59-63; *McCormick, op. cit. supra*, 586.

As an initial matter, we remark that the *Bridges v. Wixon* dictum has no relevance to prior statements which consist of sworn testimony, subject to cross-examination when made, as at a preliminary hearing. One of the statements sought to be introduced in this case was of this type. As to it, there was no substantial risk of manipulation or misrecording, and there is no reason to believe that a jury could not be depended upon reliably to assess the truth of such issues as were raised by the conflict in Porter's statement then and at the trial. As the commentators cited above have discussed at length, while statements made at trial have the

advantage of being made directly to the jury, trial may occur years after the event; an earlier statement is, if anything, likely to be more reliable, in view of the shorter period of time and the frailties of human memory. Here, the defense's claim that the prior statement ought to be disbelieved rested on Porter's alleged bias against Green and the possibility that Porter was under the influence of hallucinogens at the critical times. Those issues were fully explored at the trial, both with Porter and with persons who had observed him at the times concerned. The fact-finder had the benefit of every advantage that cross-examination and observation could give in reaching its conclusion.

We believe it would be equally wrong to exclude unsworn statements, such as the statement Porter made to Officer Wade, just because they are unsworn. Given the availability of cross-examination, the situation with respect to such statements is no different than that which applies to out-of-court statements of the defendant himself, evidence of which is regularly admitted. The law already recognizes the reliability of a witness' prior statements in a number of ways, for example, by permitting prosecutors to refresh their witness' recollection or to impeach witnesses whose memory cannot be "refreshed."¹⁴ As this Court recognized in both *Douglas* and *Bruton*, such acts, even if limited by jury instruction, may influence the determination of guilt. Moreover, if the concern

¹⁴ See also the discussion at pp. 20-21 and n. 8, *supra*.

is that in some cases such statements might have been casually made, that concern is plainly inapplicable in cases like this one, where the witness testifies fully about the interview in question, and independent circumstances (here, the attempted sales transaction arranged with Porter's help) tend to corroborate the statement made. Sufficient indicia of reliability are present in such cases to justify favoring "public policy and the necessities of the case," *Mattox, supra*, 156 U.S. at 243, by admitting the evidence of the statement.

Finally, we note that it is not necessary to decide in this case the more difficult issues which would be presented by a witness who testified but denied making any statement at all, or denied having made some part of the statement on which the prosecution seeks to rely. In the former case, the argument for admissibility would have to overcome the objection that the witness had not "affirmed the statement as his," *Douglas, supra*, 380 U.S. at 420, and thus had not opened up the possibility of meaningful cross-examination. The case of the witness who denies only part of a statement attributed to him, the *Bridges v. Wixon* situation, does not seem subject to that objection. The jury is fully able to observe demeanor, and the witness will have a full opportunity on cross-examination to explain what his statement really was, and how any mistake came to have been made. The happening of the event can be reliably determined on the basis of the evidence presented, under oath, at trial.¹⁵ See *United*

¹⁵ An example can be drawn from the *Bruton* context. If one of two defendants in a joint trial has confessed his participa-

States v. Ballentine, 410 F. 2d 375 (C.A. 2), certiorari denied, No. 488 Misc., O.T. 1969, February 24, 1970.

But these issues need not be reached here. No risk of *prosecutorial* distortion of the evidence exists in a case like this one, where the witness freely testifies that the statements attributed to him were in fact ones he made. What remains to support exclusion of the evidence is principally the law's preference that evidence be introduced live where possible. That was not possible here, and against the preference must be balanced the very real risks of witnesses who forget, or somehow are reached by the defendant and per-

tion in the offense, and has also implicated his co-defendant, the co-defendant's opportunities for cross-examination are more limited where the alleged confessor entirely denies making any confession than in the case where he admits to having confessed but denies having implicated his co-defendant. In the former case, all that can be investigated is whether the statement was made or not; the co-defendant will be unable to test the particular matter which concerns him, the allegation that he too had participated; and it would be improper to infer from the conclusion that the statement was made that all of its details were true. Where the confessor admits the confession, but denies having implicated his co-defendant, cross-examination can more readily reach the truth of that issue.

Such considerations have led two circuits to reason in the *Bruton* context that it is error to permit the jury to hear confessions implicating a co-defendant, even if the alleged confessor testifies, where the confessor entirely denies having made the statement. They have distinguished the cases cited above at pp. 20-21 on the basis that admission to having made a statement is the *sine qua non* of effective inquiry and cross-examination. *Townsend v. Henderson*, 405 F. 2d 324, 329 (C.A. 6); *O'Neil v. Nelson*, No. 23,149 (C.A. 9), decided January 26, 1970, sl. op. 3-6.

suaded to change their tune. So long as the defense is able to expose and contradict the flaws in testimony through the adversary process, the prosecution ought to be able to present all matters which reliably tend to establish the truth of guilt. The evidence of witness Porter's prior statements in this case, admitted by him, corroborated by outside circumstances, and fully subject to examination at trial, did just that.

The fundamental error of the California Supreme Court, in our view, is that it failed to distinguish between the situation where an attempt is made to introduce the statement of a witness who is not available for cross-examination before a jury and the situation presented here, where the witness is available for cross-examination as to both his present testimony and his earlier inconsistent statement. Certainly on the facts here (and of its prior decision in *Johnson*) the California court's conclusion that there could be no effective cross-examination at trial as to the prior statements is unsupported. While a state or the federal government is free to fashion exclusionary rules of evidence stricter than constitutionally necessary where that is suggested by considerations of policy, nothing in the Confrontation Clause or elsewhere in the Constitution justifies the reversal on federal constitutional grounds of the conviction in this case.

CONCLUSION

It is therefore respectfully submitted that the judgment of the California Supreme Court that the prior inconsistent statements in this case were constitu-

tionally inadmissible should be reversed and the cause remanded for proceedings not inconsistent with this Court's opinion.

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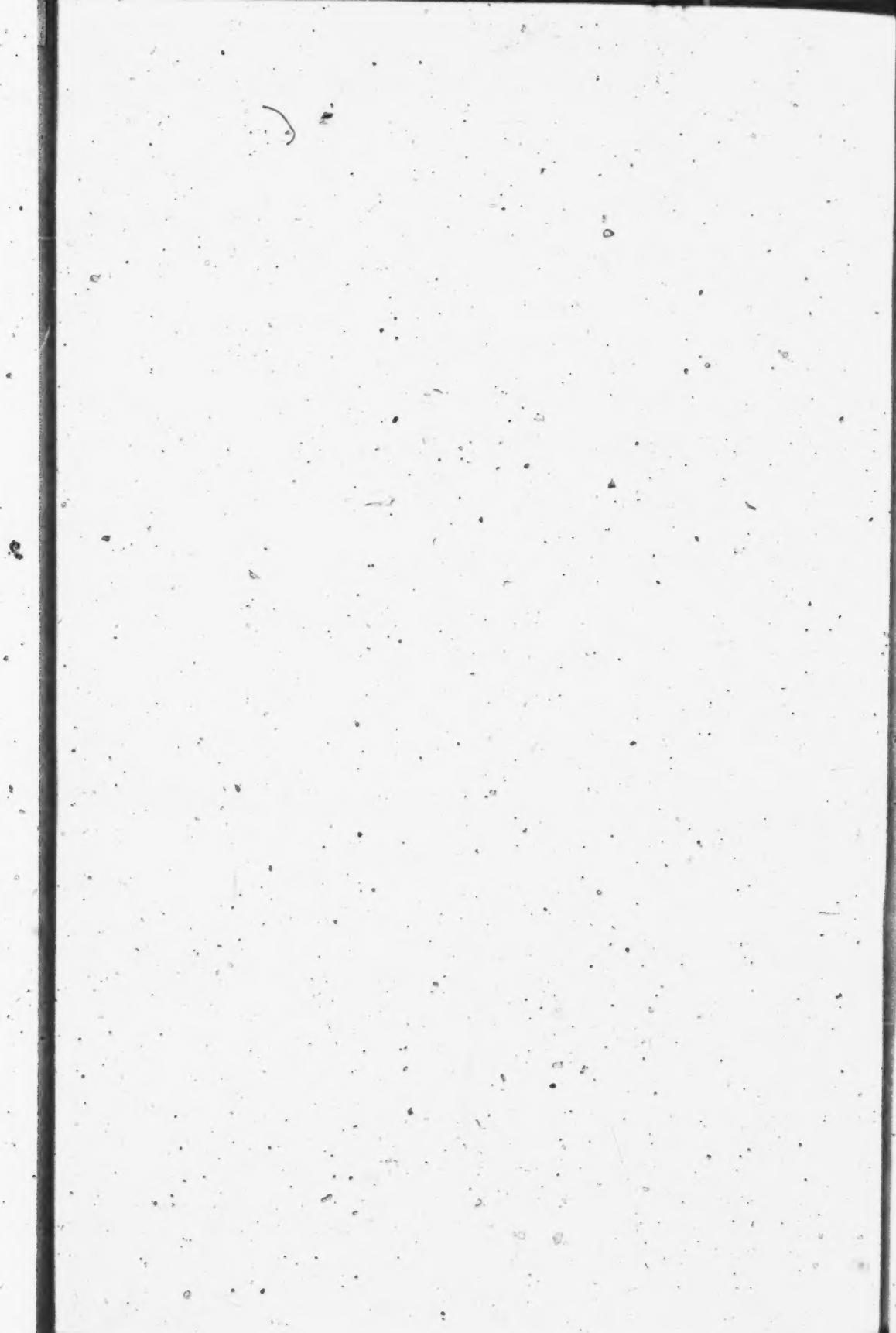
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MARCH 1970.



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

No. 387

CALIFORNIA,

Petitioner,

v.

JOHN ANTHONY GREEN,

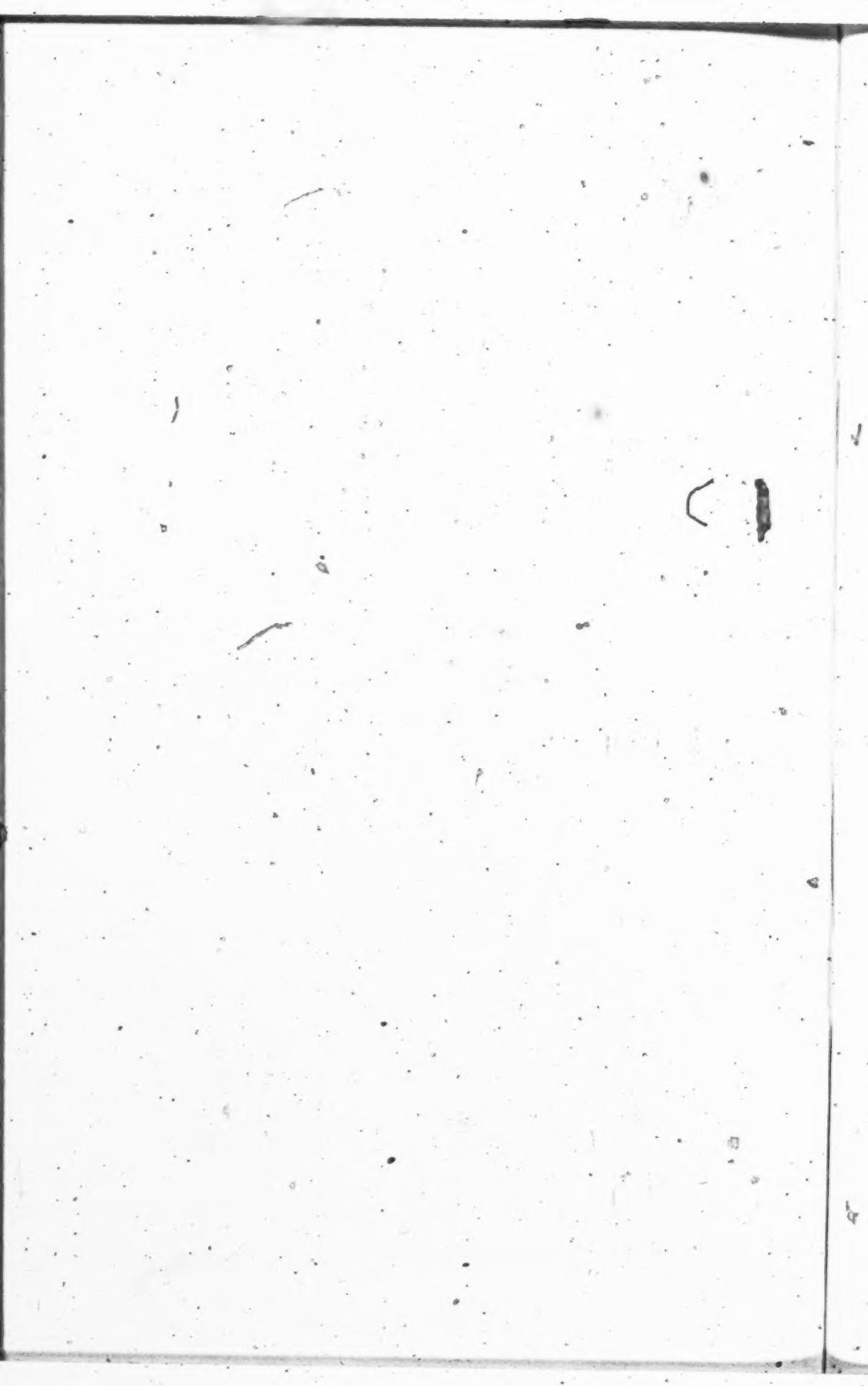
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT

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INDEX

	Page
Opinions Below	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement	2
Summary of Argument	12
Argument	14
History of Confrontation	19
This Court's Cases	24
Exceptions to the Right	29
(a) Necessity	31
(b) Trustworthiness	33
Three Aspects of Confrontation	37
Practical Results of Adopting the State's Position	40
Conclusion	50
Appendix A—Constitutional Provisions and Statutes Involved	A. 1
Appendix B—Excerpts from "LSD - 25: A Factual Account"	B. 1

TABLE OF AUTHORITIES

CASES:

Alford v. United States , 282 U.S. 687 (1931)	26
Barber v. Page , 390 U.S. 719 (1968)	passim
Bartlett v. Kansas City Pub. Serv. Co. , 349 Mo. 13, 160 S.W. 2d 740 (1942)	20
Berger v. California , 393 U.S. 314 (1969)	11, 28, 31
Bridges v. Wixon , 326 U.S. 135 (1945)	13, 24, 29, 30
Bruton v. United States , 391 U.S. 123 (1968)	13, 27, 29

Chapman v. California, 386 U.S. 18 (1967)	11
DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925)	31
Dillard v. Bomar, 342 F.2d 789 (6th Cir.), cert. denied, 382 U.S. 883 (1965)	48
Douglas v. Alabama, 380 U.S. 415 (1965)	13, 15, 25, 29, 39
Dowdell v. United States, 221 U.S. 325 (1911)	25
Ferguson v. Georgia, 365 U.S. 570 (1961)	35
Fiswick v. United States, 329 U.S. 211 (1946)	27
Gilbert v. California, 388 U.S. 263 (1967)	26, 29, 37
Goings v. United States, 377 F.2d 753 (8th Cir. 1967)	19
Goldberg v. Kenny, 38 U.S.L. Week (March 23, 1970)	45, 46
Green v. Caulk, 16 Md. 556 (1860)	20
Harrington v. California, 395 U.S. 250 (1969)	28
Hickory v. United States, 151 U.S. 303 (1894)	24
Iowa v. Washington, 160 N.S.2d 337 (Iowa 1968)	43
Johnson v. Florida, 391 U.S. 596 (1968)	15
Krulewitch v. United States, 336 U.S. 440 (1949)	27
Mathews v. United States, 217 F.2d 409 (2d Cir. 1954)	29, 30
Mattox v. United States, 156 U.S. 237 (1895)	30, 32, 39
McCray v. Illinois, 386 U.S. 300 (1967)	43
Motes v. United States, 178 U.S. 458 (1900)	27
Palmer v. Hoffman, 318 U.S. 109 (1943)	31
Parker v. Gladden, 385 U.S. 363 (1966)	25, 29
People v. Gould, 54 Cal. 2d 621, 354 P.2d 865 (1960)	37
People v. Gibbs, 63 Cal. Rptr. 471 (Cal. App. 1967)	34, 35
People v. Johnson, 68 Cal. 2d 599, 441 P.2d 111 (1968)	11, 14, 21
Pointer v. Texas, 380 U.S. 400 (1965)	2, 11, 13, 25, 28, 29, 30
Reece v. Georgia, 350 U.S. 85 (1955)	42
Roviar v. United States, 353 U.S. 53 (1957)	42, 43
Salinger v. United States, 272 U.S. 542 (1926)	21
Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968)	44

Sibron v. New York, 392 U.S. 40 (1968)	15
Smith v. Illinois, 390 U.S. 129 (1968)	26, 29
Snyder v. Massachusetts, 291 U.S. 97 (1934)	29
Southern Ry. v. Gray, 241 U.S. 333 (1916)	21
State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939)	22, 23, 24
Thompson v. Louisville, 362 U.S. 199 (1960)	15
Turner v. Louisiana, 279 U.S. 466 (1965)	25, 29
United States v. Block, 88 F.2d 618 (2d Cir. 1937)	31
United States v. Conway, 415 F.2d 158 (3d Cir. 1969)	44
United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964)	37
United States v. Hinkle, 307 F. Supp. 117 (D.D.C. 1969)	44
United States v. Motte, 251 F. Supp. 601 (S.D.N.Y. 1966)	44, 48
United States v. Shyvers, 385 F.2d 837 (2d Cir. 1967), cert. denied, 390 U.S. 998 (1968)	43
United States v. Tucker, 380 F.2d 206 (2d Cir. 1967)	43
United States v. Wade, 388 U.S. 218 (1967)	13, 26, 29, 41
Virgin Islands v. Acquino, 378 F.2d 540 (3d Cir. 1967)	34
Washington v. Texas, 388 U.S. 14 (1967)	18
Wheeler v. Montgomery, 38 U.S.L. Week 4230 (March 23, 1970)	45
White v. Maryland, 373 U.S. 59 (1963)	41
White v. Ragen, 324 U.S. 760 (1945)	42

CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment to the United States Constitution	passim
Fourteenth Amendment to the United States Constitution	2, 14, 19, 25
California Evidence Code § 770	2, 6
California Evidence Code § 1235	passim
California Health and Safety Code § 11532	2, 4
18 U.S.C. § 3060, as amended by P.L. 90-577, § 303 (1968)	42

MISCELLANEOUS:

American Law Institute's Model Code of Evidence, Rule 503, 22 Ark. L. Rev. 784 (1969)	21
22 Ark. L. Rev. 784 (1969)	30
Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, "Fact Sheets (1969)"	16
Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, "LSD-25: A Factual Account (1969)"	16, 17
Comment, "Federal Confrontation: A Not Very Clear Say on Hearsay," 13 U.C.L.A. L. Rev. 366 (1966)	30
Federal Business Records Act, 28 U.S.C. 1732, 33, as amended, 28 U.S.C. 1732(b) (Supp. V 1964)	31
82 Harv. L. Rev. 472 (1968)	37
Heller, The Sixth Amendment to the Constitution of the United States 104 (1951)	19
Maguire, "Evidence: Common Sense and Common Law" 45-50 (1947)	20
"The Use of Prior Recorded Testimony and the Right of Confrontation" 54 Iowa L. Rev. 360 (1968)	31, 32
3 Wigmore § 1018 (2d ed. 1923)	21, 22
5 Wigmore § 1364 (3d ed. 1940)	19, 20

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the Supreme Court of California of which petitioner seeks review is reported as *People v. Green*, 70 A.C. 696, 75 Cal. Rptr. 782, 451, P.2d 422. It appears in the Record Appendix at page 104. The decision of the District Court of Appeal, Second Appellate District, County of Los Angeles, is also reported as *People v. Green*, appears at 265 A.C.A. 1, 71 Cal. Rptr. 100, and is reprinted as an Appendix to the State's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution, California Evidence Code §§ 770 and 1235, and California Health and Safety Code § 11532 appear as Appendix A attached hereto.

QUESTIONS PRESENTED (as posed by petitioner)

1. Do the holdings of this Honorable Court in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 and *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?
2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination and scrutiny as to demeanor by the trier of fact?

STATEMENT

Respondent was convicted by a judge without a jury in the Superior Court of the State of California for the County of Los Angeles of violating the California Health and Safety Code, § 11532, which prohibits the furnishing, selling and/or giving of a narcotic to a minor (A. 98). At the time of the alleged offense, respondent was twenty-four years old, and the young man to whom he purportedly gave

marijuana, Melvin Porter, was sixteen (Tr. 4; A. 3, 55).¹ The alleged crime occurred in January 1967 (A. 1).

The only witness to the "crime" was Porter, and it was one of his stories that convicted respondent. Before, during and after the trial, *Porter gave four separate and entirely different versions of the events surrounding the alleged offense:*²

¹"Tr." refers to the original transcript of the preliminary hearing held on February 8, 1967, on file with the Clerk. "A." refers to the printed Appendix distributed to the Court. "Trial" refers to the original transcript of the trial held on April 5-7, 1967, on file with the Clerk.

²The dependability of Porter as a witness can best be gauged by the Court's own characterizations of him. Thus, during the trial and the post-trial proceedings, the Court said of Mr. Porter: " * * * the witness' actions so far have indicated a certain hostility by lack of knowledge" (A. 13); " * * * this is a highly unsatisfactory performance on the part of this young man * * *" (*ibid.*); " * * * I am not particularly satisfied with the course of the witness' behavior here * * *" (A. 14); " * * * I want to see just how delinquent he is in his answers, and whether or not there may be some other course we may have to take with his attitude" (*ibid.*); "I am aggravated at his reluctance to act as a normal witness to respond to questions that have been asked of him" (A. 18); " * * * what is the probative value as to this 16 year old who comes in here and defies the Court and counsel with his non-responsive, insolent answers?" (A. 29); "What concerns me about this apparently worthless type of youth * * *" (A. 30); "I think the Court has to take judicial notice of the debased worthlessness of this young Porter who testified before the Court, who counsel observed" (Trial 185); " * * * his poor mother has the sympathy of this Court. He is a derelict of society at 17 years of age" (*ibid.*); "I sympathize with his mother. I have never seen as calloused, from his own testimony, a youth of 16 * * * as this boy on the stand at his age" (Trial 194); "Taking Porter as the renegade that he is, and the small probability attached to the veracity of this young renegade * * *" (Trial 210); "I think that one of the reasons this juvenile is as worthless as he is * * *" (Trial 228); " * * * he would not have been the worthless youngster of sixteen that came in here before the Court" (*ibid.*).

The prosecutor himself was forced to admit Mr. Porter's worthlessness and lack of veracity. For example, he said of him: " * * * practically, of course, if the entire case depends on the veracity of the

1. Porter as well as respondent was arrested for violating the Health and Safety Code (Tr. 29, 30-31; A. 13). On January 31, 1967, four days after his arrest and while he was still in police custody, Porter was interrogated by Officer Barry Wade at Juvenile Division Headquarters (A. 27, 31, 38, 41). No one was present except those two (A. 27). According to Officer Wade, Porter told him that sometime between January 1 and January 10, respondent called Porter on the phone, said he had a kilo of marijuana, and asked if he could bring it over and leave it with Porter. Respondent referred to the drug as "stuff" or "grass" (A. 37). Porter said respondent could come over, and respondent personally delivered to Porter that same afternoon at Porter's house a brown shopping bag containing twenty-nine wax bags of a green leafy material resembling marijuana (A. 37). According to an offer of proof covering the same interrogation by Officer Wade, respondent told Porter that Porter could keep one bag for himself and that respondent would pick up the remaining bags at a later date (A. 32).

2. On February 8, 1967, Porter testified at a preliminary hearing in this case before Committing Magistrate Leila Bulgrin of Division 68, Municipal Court of the Los Angeles Judicial District, and gave his second version of the offense. He was still in custody, having pleaded guilty to a sale of

juvenile, the Court is going to have some serious problem" (Trial 184); "Now, relating the evidence in this case, this young man, this Porter, obviously is not an Eagle Scout" (*ibid.*); "**** your Honor, as well as I, thought that the testimony of the young man was certainly evasive and, perhaps, untruthful in certain details ****" (Trial 185); "**** the defense put on witnesses to testify to the lack of his reputation for lacking truthfulness and so forth, I am sure it is true ****" (*ibid.*); "**** Porter, whether he is a punk or not, doesn't matter" (Trial 190); "It is easy on a case like this to put Porter on trial and say, 'Well, such a crummy kid is not to be believed, and he told different stories ****'" (Trial 204); "**** Porter certainly has told different stories ****" (*ibid.*); "**** I don't think the Court, or myself for that matter, had ever placed any great confidence in the integrity of Porter ****" (Trial 220).

Two witnesses testified at the trial as to Porter's bad reputation in his community. See Trial 96-97, 99.

marijuana (Tr. 29-30, 31). This time, he said that respondent called him on January 5th or 6th and asked if he could come over because he wanted Porter to sell a kilo of "marijuana" (Tr. 5-6; A. 19-20). Respondent did come over, and following a conversation respondent took Porter to the house of respondent's father and showed him a bag behind a bush in the back yard (A. 21-22; Tr. 22-23). The arrangement was that Porter was to pay respondent for the marijuana after he in turn had sold it to others, although Porter could not remember whether respondent told him how much to sell it for (Tr. 7, 16, 25). The two left the bag behind the bush. Either the same night or the next night (*cf.* Tr. 14 with Tr. 23), Porter went with one Bob Smootz back to the home of respondent's father, and while Smootz waited on the street, Porter found the bag behind the bush and returned with it to his own home (Tr. 16-17, 18, 22-23). (Smootz later swore at the trial that he never made any such trip A. 70.) Porter temporarily put the shopping bag, which contained twenty-nine smaller bags, or "baggies," in his closet (Tr. 6, 18-19, 21). The next day, Porter took out about seven of the smaller bags and smoked marijuana in his back yard (Tr. 8, 11-12, 19-22). Apparently on the same day, he sold a few bags and gave respondent \$60 to \$80 in cash (Tr. 7, 24). On the following Sunday, some one broke into Porter's house and stole the shopping bag with about twenty-two baggies in it (Tr. 7, 21, 22, 30). There was now only one baggie left—one which had been hidden under a book counter (Tr. 10-11, 29-31, 32). Officer Dominguez, an undercover agent, came to Porter's house and bought this baggie (*ibid.*). The officer asked where Porter had gotten it, and Porter said, "A guy named John" (Tr. 29). The officer left, and Porter was subsequently arrested.

3. The third version of Porter's story was given at trial before Judge Prentiss Moore of the Superior Court of Los Angeles County. By now Porter was on probation from his conviction upon a plea of guilty to a sale of marijuana (A.

13). He said he thought³ respondent had called him about some "stuff" respondent wanted to sell (A. 5-6, 8). Porter, however, could not remember any of what happened afterward. He knew he received some marijuana, but he had no idea whether respondent came to his house (A. 7, 11, 12, 17); whether, if he came, respondent brought anything with him (A. 7-8, 11-12); whether anyone told him where to find marijuana (A. 17), or where he got the marijuana (A. 12). The reason for this confusion and lack of recollection, he said, was that some twenty minutes before respondent called him, he had taken LSD, which he had obtained from a man called "Lug Head" at Topanga Plaza (A. 7, 12, 17, 23-24, 26, 66-67). The drug produced a highly hallucinatory affect on him (A. 23-24). He had also taken LSD on several other occasions prior to this incident (A. 5, 23).

At this point in the trial, the prosecutor, over objection (A. 8) and relying entirely on California Evidence Code §§ 770 and 1235, quoted selectively⁴ from Porter's testimony at the preliminary hearing in an attempt to prove that respondent had in fact given the marijuana to Porter (A. 9-10, 19-22). Porter's response at trial as to whether any of this testimony given at the preliminary hearing had been truth-

³ "Q. Did he call you at your home?

"A. Yeah, I think so, yes.

"Q. Did you speak with him on the telephone?

"A. Yes.

"Q. Did you recognize his voice?

"A. Oh, yeah, I guess I knew it was him; I guess.

"Q. You had spoken to him before on the telephone?

"A. Yeah.

"Q. Did you have a conversation concerning narcotics?

"A. Well, he called me up, and he just said that he had some stuff he wanted me to sell." (A. 5).

⁴ Porter's testimony at the preliminary hearing covered twenty-seven pages. Only six and a half of these pages were quoted at the trial. As noted by the California Supreme Court, "With one unsignificant exception, Porter's preliminary cross-examination was not read to the court" (A. 112 n. 5).

ful and accurate was, at best, equivocal.⁵ He could not say whether it was accurate or not, because he had been under the influence of LSD at the time of the events in question

- ⁵ Q. BY MR. IDEMAN: Now, do you remember so testifying?
A. Well, not—like I said, I can't remember that much, but—
Q. Well, I am asking you now whether you remember being asked these questions and giving these answers at the time of the preliminary hearing?
A. Somewhat, yes.

- Q. BY MR. IDEMAN: Now, Melvin, is there anything in there, what I have read to you, that is not true, that you did not say at the time of the preliminary hearing?
A. Well, like I say, I can't remember what I said at the preliminary hearing.
Q. Is it a fact that at the time of the preliminary hearing you were telling the truth as you believed it to be at that time?
A. Yes, I believed it to be at that time, yes.
Q. I see; and the present testimony is that you don't remember whether the defendant brought you anything?
A. After the phone call that—I can't absolutely say that he came over and brought me anything, no. [A. 10-11].

- Q. Now, Melvin, up to this point the questions and answers that I read to you, are those the questions that were asked of you at the preliminary hearing and were those the answers that you gave?
A. Well, as well as I can remember, yes.

- Q. You were telling the truth at the time that you were testifying then? is that right?
A. Yes. [A. 20.]

- Q. BY MR. IDEMAN: Now, were those questions asked of you, and did you give those answers at the preliminary hearing?
A. Yes, I guess so, yes. I'm pretty sure.
Q. Does that refresh your recollection as to where you got that shopping bag full of marijuana?
A. Well, I mean—like I already said, I can't be that sure. I mean—

[continued]

and simply had no memory of what had occurred (A. 7, 12, 17, 23-24, 26, 66-67). Porter's testimony quoted from the preliminary hearing and his statement to Officer Wade constituted the *only* evidence adduced at trial that respondent had given marijuana to Porter, which was the sole criminal charge placed against him (A. 1).

Only two other witnesses appeared for the prosecution at trial. Officer Wade testified to his interrogation of Porter, as outlined above. The testimony of the other witness, Officer Ramon Dominguez, was entirely consistent with respondent's defense. The officer said that about eight or nine days after he bought some marijuana from Porter on January 10, 1967, he called Porter to make arrangements for further purchases (A. 47-48). He then received a call

Q. Melvin, my question is, by reading the questions and answers to you, does that refresh your recollection? Does that make you remember where you got that shopping bag of marijuana? * * *

THE WITNESS: I guess so, yes. [A. 22.]

* * *

Q. [By defense counsel]. Now, the Deputy District Attorney has read to you certain testimony and has asked you some questions concerning that.

Now, did that refresh your recollection as to what you testified to at the time of the preliminary hearing?

A. Yes.

Q. Now, did it refresh your recollection as to what actually happened that first week in January?

A. Well, I could remember more then; but if that is what I said, that is probably what happened, yes.

Q. Did it merely refresh your recollection as to your testimony at the time of the preliminary hearing, or did it refresh your recollection as to what actually happened?

A. Mostly my testimony, I guess.

Q. So you are still unsure as to actually what happened after Mr. Green had phoned you on the telephone, and after you had taken this dose of LSD; is that correct?

A. Do you mean am I uncertain?

Q. BY MR. COONEY: Yes, that's the question.

A. Yes, I'm not positive now. [A. 24-25.]

from a man identifying himself as "John," and they arranged to meet at Gus' Hot Dog Stand (A. 49), where Porter was employed (A. 51). The two met outside the stand, and a purchase of marijuana was discussed (A. 50-51). Respondent handed the officer a glass of Coca-Cola with a powdery substance in it, told him it was LSD, and asked him to drink it. The officer declined (A. 52-53). Respondent also asked him if he would smoke some marijuana (which respondent did not produce), and the officer again declined (A. 53-54). At that point all "negotiations" broke off (A. 53).

In regard to this incident, the versions given by both Porter and respondent were entirely consistent with that given by Officer Dominguez, with some important additions. Porter testified that he had told respondent he thought Dominguez was a police officer, and he admitted he might have asked respondent to find out if this were a fact (A. 57-58). Respondent testified that Porter, who had been a friend of long standing (A. 75-76, 79, 86), did ask him to find out if Dominguez was a police officer (A. 77, 83-84, 87-89, 96). The two planned that if Dominguez really wanted to buy, respondent would sell him peat moss instead of marijuana and baking soda instead of LSD (A. 76-77, 89-90). Respondent met with Dominguez at the hot dog stand and, realizing that a police officer would not take LSD or smoke marijuana, pretended that an aspirin pill in a glass of Coca-Cola was LSD and that some marijuana was hidden under a car (A. 76-78, 84-85, 92-95). The tests—entirely innocent in respondent's eyes (A. 83-84)—proved valid in the light of Dominguez's refusal to participate, and Dominguez was revealed to respondent's satisfaction to be an undercover agent.

Respondent denied that he had ever sold or given Porter any drugs of any kind, that he had ever seen Porter smoke marijuana, or that he himself had ever dealt in drugs (A. 76,

79, 86-87). The only thing he did do, he said, was to attempt a favor for a friend (A. 79).⁶

* Why did Porter turn on respondent and identify him as the sourcee for his marijuana? The answer was supplied by Porter himself, by respondent, and by one Daniel Blackmore. They testified that respondent had sold Porter a car sometime prior to the alleged crime, that Porter had been unable to keep up his payments, and that on the very day Porter was arrested, respondent repossessed the car (A. 60-61, 64-65, 68-69, 76, 87, 90, 97). Blackmore testified that Porter was mad at respondent and told Blackmore he "was going to get back" at respondent (A. 69). Porter virtually admitted on the stand that he told Blackmore he was going to get even with respondent (A. 60-61, 65).

4. Porter's fourth version of the events in question was introduced after respondent was convicted. In a notarized statement submitted as part of a motion for a new trial and made on the advice of his probation officer, Porter swore that respondent had never sold him drugs, that Porter had understood from "Lug Head" that he would be compelled to name some person as his supplier of drugs, that he therefore arranged for respondent to see Officer Dominguez; that the police told him he would be "out of circulation for a long time" unless he implicated respondent, and that he did implicate respondent because of fear and an "inability to distinguish between reality and fantasy" (A. 99-100).

The trial court seems to have found respondent guilty on the theory that if he had really been repelled by Porter's prior use of drugs, as he claimed, he would not have offered to take part in the scheme to uncover Officer Dominguez (Tr. 208-212). The trial judge gave no indication as to which of Porter's pre-trial statements he believed, if either.

⁶ Respondent's denial of guilt is supported by additional facts in the record. Despite an attempt by the prosecution to portray respondent as someone engaged in the trafficking of drugs, investigation revealed that respondent worked for eight different employers and earned a total of \$4,000 in 1966. See Trial 166, 169.

Respondent's motion for a new trial was denied (A. 101), and he was sentenced to five years in prison, the sentence to be suspended on condition, *inter alia*, that he serve one year in the county jail (A. 101). Respondent appealed to the District Court of Appeal, Second Appellate District of Los Angeles, which unanimously reversed his conviction on the ground that permitting the introduction of testimony given at a preliminary hearing for the truth of the matter asserted by a witness at trial was a denial of the right of confrontation under the Sixth Amendment to the United States Constitution. California Evidence Code § 1235, pursuant to which this evidence had been admitted, was thus held unconstitutional, the court relying on *People v. Johnson*, 68 Cal. 2d 599, 441 P.2d 111 (1968), and *Chapman v. California*, 386 U.S. 18 (1967).

The State appealed, and the California Supreme Court unanimously agreed with the lower appellate court and reversed the judgment of conviction. The Court relied upon its own *Johnson* decision, *supra*, which held the Evidence Code unconstitutional when applied to prior inconsistent testimony given to a grand jury without the presence of the defendant, his counsel or the ultimate trier of fact, and in addition upon this Court's decisions in *Pointer v. Texas*, 380 U.S. 400 (1965), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger v. California*, 393 U.S. 314 (1969). The California Supreme Court gave numerous reasons why cross-examination at a preliminary hearing is not adequate: the trier of fact cannot observe the witness' demeanor and manner while he is testifying; the trier of fact cannot observe the cross-examiner's style, rapport, etc.; the attorney may conduct himself differently before a committing magistrate than before a trial court or jury; since the purpose of a preliminary hearing is so different from that of a trial, neither prosecution nor defense may be willing or able to cross-examine fully; there is usually too little time before the preliminary hearing for adequate preparation; any other ruling would result in converting the preliminary hearing into a full-scale trial, etc.

This Court granted the State's petition for a writ of certiorari and respondent's motion for leave to proceed in forma pauperis (A. 119), and appointed the undersigned attorney to represent respondent in this Court.

SUMMARY OF ARGUMENT

The two pre-trial statements given by Porter—the unsworn one to Officer Wade and the one at the preliminary hearing—constituted the only evidence at trial of respondent's guilt. Yet at trial respondent failed to verify the facts in the prior statements, and instead informed the Court for the first time that on the day of the alleged offense, he was under the influence of LSD. Since respondent was denied contemporaneous cross-examination before the trier of fact as the statements that convicted him were introduced, he was denied his right of confrontation under the Sixth Amendment to the United States Constitution.

The right to confront a witness at the time his statements are made is paramount in a criminal trial. Confrontation requires the witness to give the testimony upon which the prosecution relies for conviction while the witness is confronted and cross-examined by the defendant at trial, thus maximizing the likelihood that the witness will tell the truth. The trier of fact is allowed to view the demeanor and manner of the witness while the incriminating testimony is actually being given. And the subjective moral impact of the courtroom is brought to bear in eliciting the truth at the very time the all-important testimony is being produced. Because these requirements of confrontation were missing, the trier of fact at trial could *not* determine the truthfulness of Porter's prior statements that convicted respondent.

The Sixth Amendment right of confrontation was an outgrowth of the common law, and the California Evidence Code is a restriction on that common law right. The decisions of other courts and of this Court—particularly

Bridges v. Wixon, 326 U.S. 135 (1945); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *United States v. Wade*, 388 U.S. 218 (1967); *Barber v. Page*, 390 U.S. 719 (1968), and *Bruton v. United States*, 391 U.S. 123 (1968)—clearly require contemporaneous confrontation and cross-examination before the trier of fact.

The recognized exceptions to the right of confrontation are not applicable here. Since Porter was present at trial, there was no necessity in the constitutional sense for the introduction of his prior statements. Moreover, the "necessity" exception assumes that the prior statement and the testimony the declarant would have given at trial would be the same, whereas here we have positive proof that they are not. As for the requirement of trustworthiness, it simply does not apply in this case, where the witness was under the influence of LSD at the time of the alleged offense, where he gave four different and conflicting statements, and where he was in police custody and charged with a crime when he made the two statements that incriminated respondent.

Not only would an adoption of the State's position deny the respondent his Sixth Amendment rights and be unfair to him in his attempt to defend himself, but it would have an extraordinarily adverse effect on the fair administration of justice generally. Among other results, attorneys would have to be appointed at earlier stages, pre-trial hearings would be greatly expanded to allow full and complete cross-examination of all witnesses, preliminary hearings would have to be delayed to allow defense attorneys proper time to prepare for cross-examination, etc.

For all these reasons, the conclusion reached unanimously by two appellate courts and nine judges below should be approved, and the judgment of the California Supreme Court should be affirmed.

ARGUMENT

Two types of statements were introduced at respondent's trial to prove his guilt. One was an oral statement to a police officer while the declarant was in custody and under charge for a crime. This statement was unsworn, and the declarant was not subject to cross-examination at the time it was made. No written transcript or rendition of the statement was introduced; rather, the officer to whom it was made testified as to his recollection of it. Insofar as the State is arguing for the admissibility of this type of statement, it is really rearguing *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111 (1968), in which this Court denied certiorari. 393 U.S. 1051 (1969). In that case the California Supreme Court held it a violation of the Sixth and Fourteenth Amendments for the State to introduce the grand jury testimony of a witness as substantive evidence at trial, when neither the defendant nor his attorney had been present at the grand jury proceedings to cross-examine the witness.

The second statement made by Porter that implicated respondent was made up of selected portions of the testimony of the same declarant during respondent's preliminary hearing. Respondent's attorney did cross-examine Porter on this statement at the hearing, although his cross-examination was limited and was not read or introduced at the subsequent trial. The hearing was held before a committing magistrate, a different person than the Superior Court judge who found respondent guilty at trial.

The State has not differentiated these statements in its brief to this Court. The State takes the broad position that any statement, whether sworn to or not, whether or not the declarant was cross-examined on it, and regardless of the circumstances under which it was made, is admissible at trial for the truth of its contents, so long as the declarant is available at trial for cross-examination.

On the possibility that the Court might deem one type of statement inadmissible but the other admissible, respond-

ent is addressing himself in this brief to the unconstitutionality of the admission of both types of statements.

Although the issue before the Court is essentially a legal as opposed to a factual one, it could not have been posed against a factual backdrop that more dramatically and illuminatingly demonstrated the risks and dangers of any result other than the one reached by the California Supreme Court. Just as "The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case" (*Sibron v. New York*, 392 U.S. 40, 59 (1968)), so too the facts in this case bear stark witness to the constitutional disability.

The prosecutor was quite correct when he told the trial court that how Mr. Porter came into possession of twenty-nine baggies of marijuana was "the crux of the case" (A. 36). That was the only issue. The charge was that they were furnished by respondent (A. 1); the defense claimed that Porter came into possession of them through some other source. No direct evidence given verbally at trial could have convicted respondent of the charge: Porter could not remember what had occurred; Officer Wade could testify only as to what Porter had previously told him (see *Douglas v. Alabama* 380 U.S. 415, 419-420 (1965)); and Officer Dominguez testified to an entirely separate incident, one that was perfectly consistent with the defense version of events.

Thus, only if Porter's statement previously given to Officer Wade, or his entirely different statement submitted at the preliminary hearing, was taken as evidence of the truth of the events related herein could any guilt be ascribed to respondent. To put it another way, without each or both of those prior statements, respondent could not have been convicted constitutionally, for there would have been no evidence on which to base a finding of guilt. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968).

There was a very good reason why Porter at trial could remember nothing of the crucial events surrounding the offense. As he had done on other occasions, he took LSD immediately prior to a telephone call which he "thought" was from respondent and thereupon lapsed into a highly hallucinatory state (A. 7, 12, 17, 23-24, 26, 66-67). Official public documents of the United States Government attest to the immediate and far-ranging effects of LSD. Thus, "Fact Sheets (1969)," published by the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, has this to say about LSD (p. 9-1):

LSD-25 (Lysergic Acid Diethylamide) known to the "hippie" cult as "acid" is derived from the ergot fungus of rye, a disease of the rye grain. It can be found as a liquid or powder. A dose of .50 to 200 micrograms (no larger than the point of a pin) will take the user on a "trip" for approximately 8 to 16 hours.

Physical reactions may include dilated pupils, lowered temperature, nausea, "goose bumps," profuse perspiration, increased blood sugar, and rapid heart beat. During the first hour after ingestion the user may experience visual changes followed by extreme changes in mood. In the hallucinatory state, the user may suffer loss of depth and time perception accompanied by distortions with respect to size of objects, movements, color, spatial arrangement, sound, touch, and his own "body image." During this period the user's ability to perceive objects through the senses, to make sensible judgments, and to see common dangers is lessened and distorted, hence making him susceptible to personal injury. He may also injure others in the event he decides to drive a car.

After the "trip" the user may suffer acute anxiety or depression for a variable period of time. Recurrences of hallucinations have been reported days, or months, after the last dose.

Similarly, "LSD-25: A Factual Account (1969)," published by the same Bureau, states (p. 8):

There is little controversy about the *immediate* physical effects of LSD, many of which resemble the effects of other drugs; pupillary dilation, palpitations, elevated blood pressure, and others less noticeable. Neither is there much disagreement about the *immediate* psychological effects, though they may vary from one individual to the next. Some of these are: distorted perception, exaggeration or swing of certain emotions (such as anxiety and euphoria), changes in thought processes (such as loss of the sense of time), depersonalization or loss of the sense of self or separateness, magnification of the importance of common scenes or objects, loss of judgment, and terror.

One other hazard is unquestioned as a risk, although its true incidence is unknown; the possibility of recurrences of the acute effects of the drug as long as twenty months after ingestion. [Emphasis added.⁷]

It becomes clear, therefore, that Porter's statements offered at the preliminary hearing and to Officer Wade as to how he obtained the baggies of marijuana were a product of his "inability to distinguish between reality and fantasy," as he himself later admitted (A. 100). If the Court requires any assurance on this score, it need only compare the facts in one statement with the facts in the other. In one version, respondent called Porter and asked if he could leave a kilo of marijuana in his custody, to be picked up later by respondent (A. 32, 37). In the other, respondent was to leave the marijuana with Porter so that Porter could sell it and return the money to respondent (Tr. 5-6; A. 19-20). In one version respondent personally delivered the marijuana to Porter on the same afternoon as the telephone call (A. 37). In the other, respondent took Porter to the house of respondent's father and showed him a bag of marijuana behind a bush, and Porter himself picked up the bag at a later time (A. 21-

⁷A more detailed discussion of LSD from this same pamphlet appears as Appendix B to this brief.

22; Tr. 14, 22-23). In one version, as court and counsel noted, respondent called the drug "stuff" or "grass" (A. 37); in the other he called it "marijuana" (A. 19-20). No wonder that both the trial judge and the prosecutor found Porter to be totally without credibility (n. 2, *supra*). For the State now to view Porter's preliminary hearing testimony or his statement to Officer Wade as having the mark of truthfulness is to ignore the fact that Porter was incapable of telling the truth, and proved it by a series of four conflicting and totally irreconcilable versions of the same events.

If we are to turn to the *probabilities* of the situation, it is more likely that Porter really was under the influence of LSD at the time of the alleged crime and that his subsequent assertions of respondent's involvement were the product of a frightened and confused mind. Porter, after all, was himself in custody at the time of his statements to Officer Wade, and had been for four days (A. 27, 31, 38, 41). He thought he had to name a supplier of the marijuana he had sold to an undercover agent (A. 99), and whom better to name than the person who had just repossessed his car and whom he intended to "get back at" anyway (A. 60-61, 65, 69)? When he testified at the preliminary hearing, Porter was still in custody (A. 65), he had pleaded guilty to a charge of selling marijuana (A. 29-30, 31), and he would not be released until some eight days later (A. 65). So far as the record shows, he never was represented by counsel. His fear, arising out of the predicament of his circumstances, is obvious. "Common sense would suggest that he [an accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

It is against this kind of background that we must view the assertions made by the State. In no set of circum-

stances could it be more apparent that striking from the Confrontation Clause of the Sixth Amendment the requirement of *contemporaneous* cross-examination before the trier of fact—except, perhaps, in the case of absolute necessity, which is discussed below and which is not a factor here—completely destroys the ability of a person to defend against untruthful statements made in fear, out of spite, or for any other reason.

It is with this factual background in mind that we turn to the law. Our position is that Section 1235 is too broad and, particularly as applied in this case, operates as an unconstitutional abridgment of respondent's right of confrontation under the Sixth Amendment, made applicable to the states through the Fourteenth Amendment. We ask the Court to affirm as within the scope of the Confrontation Clause the succinct language of the Eighth Circuit: "The right to confront the witness *at the time the statements are made* is paramount in a criminal trial." *Goings v. United States*, 377 F.2d 753, 762 n. 12 (1967) (emphasis added).⁸

History of Confrontation

The right to confrontation did not originate with the Sixth Amendment but was a common law right *** which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh." F. H. Heller, the Sixth Amendment to the Constitution of the United States 104 (1951).⁹ The first change from the use of sworn *ex parte* statements came in the early 1600's by having the deponent appear at trial and affirm his statement. "[T]he emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essen-

⁸In using this language, the court was expressly rejecting what we hereafter refer to as the "academic" position urged by the State as opposed to the "orthodox" position which we advance.

⁹For an exhaustive study, see 5 Wigmore, Evidence, § 1364 (3d ed. 1940), where the rule is traced from the Sixteenth Century to its present form.

tial thing." 5 Wigmore § 1364 at 21. By the middle of the Seventeenth Century, the rule developed that extrajudicial statements could be used only if the deponent was unavailable. At this point, reliance was not yet placed on cross-examination; the oath and the requirement that testimony be given at trial were the protectors of truth. The importance of appearance by the witness at trial had grown to the point that this requirement could be waived only in cases of necessity. By the early 1700's, the importance of cross-examination became recognized, and sworn extrajudicial statements lost their special standing. The rule developed that "statements used as testimony must be made where the maker can be subjected to cross-examination." 5 Wigmore § 1364 at 25. In England at the end of the Eighteenth Century, unsworn extrajudicial statements were being excluded as evidence, except that prior consistent statements could be used to corroborate testimony on the stand. 5 Wigmore § 1364.

Thus, at the time of the enactment of the Sixth Amendment, while the right of cross-examination had become an indispensable part of confrontation, there remained the even longer-standing requirement that testimony on which a conviction could be based had to be given at trial. The orthodox rule of evidence on prior inconsistent statements substantiates the recognition of the common law that testimony to be used against the accused had to be given or adopted by the witness at trial.

Numerous state cases attest to the proposition that statements not subject to cross-examination must be rejected, the rationale being that only through cross-examination can the opposing party either diminish the trustworthiness of the witness or force him to reveal other facts that would qualify his statement.¹⁰ But consideration by the courts of

¹⁰E.g., *Green v. Caulk*, 16 Md. 556, 578 (1860); *Bartlett v. Kansas City Pub. Serv. Co.*, 349 Mo. 13, 16, 160 S.W. 2d 740, 742 (1942). See Maguire, "Evidence: Common Sense and Common Law" 45-50 (1947).

the precise constitutional question at issue here has not usually been necessary, since the problem has almost uniformly been avoided by the hearsay rule. Until recently, it has been the universally-accepted rule that prior inconsistent statements of a witness at trial may be used only to impeach that witness and are not admissible as evidence for the truth of the matter asserted.¹¹

Therefore, to hold in respondent's favor is not to broaden confrontation but rather to preserve what has previously existed. As this Court said in *Salinger v. United States*, 272 U.S. 542, 548 (1926), "The purpose of [the Confrontation Clause], the Court often has said, is to continue and preserve [the common law right with its recognized exceptions], and not to broaden it or disturb the exceptions." The modification embodied in the California statute, on the other hand, reduces the degree of confrontation which has been a traditional part of the common law.

As the cases and commentators have recognized, perhaps the most crucial aspect of confrontation, disregarded by the academic position, is the importance of timely, contemporaneous cross-examination. As the Supreme Court of California stated in *People v. Johnson, supra*, 441 P.2d at 117:

To assert that the dangers of hearsay are "largely nonexistent" when the declarant can be cross-examined at some later date, or to urge that such a cross-examination puts the later trier of fact in "as good a position" to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disre-

¹¹E.g., *Southern Ry. v. Gray*, 241 U.S. 333 (1916); cases cited in 3 Wigmore § 1018; Note, 133 A.L.R. 1454. The State points to the American Law Institute's Model Code of Evidence, Rule 503. It should be noted, however, that the Institute's Comment following the Rule recognizes that while a "few recent cases" support the Rule, "Almost all the decisions reject evidence of prior consistent or prior inconsistent statements of a witness when offered for the truth of the matter stated. When received, it is received only to impair or to support the credit of the witness" (p. 233).

gard the critical importance of *timely* cross-examination.^[12]

The leading case rejecting the academic position continues to be *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), which discusses the importance of timely cross-examination and illuminates other inadequacies of proposals to abandon the orthodox rule. Because the opinion by the Minnesota court is as persuasive today as when it was rendered, and because it deals so cogently with many of the points put forward by the State, we quote from it at some length:

The rule is well settled that the only office of impeaching testimony of this kind is to negative or neutralize the testimony to which it is directed. (It may also discredit the witness as such.) [Citations.] That is what Dean Wigmore calls the orthodox and "universally maintained" rule of American decision law. Although approved in the first (§ 1018), it is disapproved in the second edition of Wigmore, Evidence (§ 1018). The disapproval of the learned author is put upon the ground that the impeached witness testifies finally under oath and subject to cross-examination. Hence, he concludes, "The whole purpose of the Hearsay rule has been already satisfied," and so "there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve."

That, we submit with deference, is not enough to qualify the previous contradictory assertion as substantive evidence. The oath of the witness solemnizes his former extrajudicial statement not at all. It goes only to his testimony which is occasion for and target of the impeachment. The previous statement was when made and remains an *ex parte* affair, given without

¹² The court further stated that the practical importance of timely cross-examination "**** is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." 441 P. 2d at 118 (citations omitted).

oath and test of cross examination. Important also is the fact that however much it may have mangled truth, there was assurance of freedom from prosecution for perjury.

The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others; whose interest may be, and often is, to maintain falsehood rather than truth.

There are additional practical reasons for not attaching anything of substantive evidential value to extrajudicial assertions which come in only as impeachment. Their unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence. Declarations extracted by the most extreme of "third degree" methods could readily be made into affirmative evidence. In criminal cases the defendant would have a similar opportunity to entrap the state's witnesses, and use as evidence all their extrajudicial assertions. The same enlargement of the field of inquiry would result in civil cases.

If presence of the witness in court under oath and subject to cross examination, is enough to permit admission of his previous statements, the result should not be confined to those which happen to be contradictory. The hearsay rule, if considered satisfied as to contradictory statements, would be equally so as to declarations agreeing with the testimony of the witness. The presence in court, under oath and subject to cross examination, of the declarant, must serve to satisfy the hearsay rule as to both or as to neither kind of declaration. We hold that it is not satisfied in either case and, hence, that the extrajudicial assertion brought in by way of impeachment must be confined to that field.

The foregoing we consider entirely consistent with the single purpose of rules of evidence, which is to disclose the truth. That implies the necessity for safeguards against abuse. The general admission of earlier, extrajudicial statements would, in practice, endanger rather than facilitate the truth finding process. Different rules, of no present relevance, apply to admissions. Still another rule applies in a proper case where a witness has already testified under oath and subject to cross examination, concerning the same issue, and because of death or some other reason, is unavailable when his testimony is wanted a second time. [285 N.W. at 900-901.]

This Court's Cases

As early as 1945, this Court equated the hearsay rule with the constitutional mandate of fairness in a situation where a prior statement was in part denied by the declarant at trial. In *Bridges v. Wixon*, 326 U.S. 135 (1945), a witness at a deportation hearing admitted making a statement to investigating officers about Bridges but denied that his statement had referred to Bridges' communist activities. Even though this was a civil rather than a criminal proceeding (see pp. 44-45, *infra*), the Court held the use of the prior statement unconstitutional. Said the Court:

The statements which O'Neil allegedly made were hearsay. We may assume that would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 U.S. 303, 309 [1894] ***. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the motions of fairness on which our legal system is founded.
*** [326 U.S. at 153-154.]

Thus, by 1965 this Court could clearly say, "In the constitutional sense, trial by jury in a criminal case necessarily

implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965).¹³

While not faced with the precise situation that obtains here, the Court since *Turner* has strengthened the concept of contemporaneous cross-examination and observance of the witness as he gives his incriminating testimony.

Thus, in *Pointer v. Texas*, *supra*, 380 U.S. 400, the Court applied the Sixth Amendment to the states through the Fourteenth Amendment and held it unconstitutional to admit at trial a statement made at a preliminary hearing by a complaining witness who had not been cross-examined at the hearing (the defendant had been without counsel) and who was no longer available to testify at trial. In a companion case, *Douglas v. Alabama*, *supra*, 380 U.S. 415, the Court held the confession of an accomplice inadmissible in a state case, even though the accomplice was present at the trial, because he refused to answer cross-examination questions on self-incrimination grounds. The Court emphasized the importance of compelling the witness to stand face-to-face with the jury so that his demeanor and manner could be judged by the trier of fact.

In *Parker v. Gladden*, 385 U.S. 363 (1966), the Court, quoting *Turner*, again reversed a state conviction because a bailiff had made remarks against the defendant that had been overheard by several jurors. His remarks constituted

¹³ Similarly, in interpreting a section of the Philippine Bill of Rights, held to be substantially the same as the Sixth Amendment, the Court pointed out that the right of confrontation "**** intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination" (*Dowdell v. United States*, 221 U.S. 323, 330 (1911)).

"evidence" as to which the defendant had no confrontation and no cross-examination.

In *United States v. Wade*, 388 U.S. 218 (1967), even though witnesses appeared personally at trial and identified the defendant as the guilty party, the Sixth Amendment was held violated because the courtroom identification could have resulted from a prior police lineup identification at which the defendant was not represented by counsel. Said the Court: "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him" (*id.* at 235). Similarly, in *Gilbert v. California*, 388 U.S. 263 (1967), where in-court identifications may have been, or were, tainted by identifications at a lineup of which the defendant's attorney had no knowledge, the conviction was vacated.

In a case of particular importance here, the Court in *Smith v. Illinois*, 390 U.S. 129 (1968), held that it was unconstitutional in a state trial not to allow the defense to ask a key witness for the prosecution what his real name and address were. The reason the case is significant is that the questions asked were seemingly insignificant, and yet the Court, relying extensively on *Alford v. United States*, 282 U.S. 687 (1931), pointed out that "a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them" would deny a fair trial—an observation that goes to the essence of the problem facing the respondent here.

Smith was followed a few months later by a case of even greater significance. In *Barber v. Page, supra*, 390 U.S. 719, the Court gave strong indication that it is not cross-examination in general which is constitutionally vital but rather the right to contemporaneous cross-examination before the trier

of fact. In that case, a witness who testified against the defendant at a preliminary hearing was unavailable at trial. He had not been cross-examined by the defendant's counsel at the preliminary hearing, and therefore this Court could have rested its rejection of the prior testimony on this ground. Instead, however, the Court went on to say: "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes v. United States*, 178 U.S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial" (*id.* at 725).

That same year, in *Bruton v. United States*, 391 U.S. 123 (1968), a witness testified at a joint trial of Bruton and Evans that Evans had confessed to him in a statement implicating Bruton. The jury was instructed, and this Court strongly agreed,¹⁴ that the statement was inadmissible hearsay against Bruton. The state court subsequently held that the statement should not even have been admitted against Evans, since it had been obtained while he was in police custody and without counsel. This Court ruled that, despite the instruction to the jury, there was a possibility that the jury could have considered the statement as indicative of Bruton's guilt, and therefore its introduction denied Bruton his constitutional right to cross-examination. In so ruling, the Court noted: "**** The reason for excluding

¹⁴ "We emphasize that the hearsay statement inculpating petitioner [Bruton] was clearly inadmissible against him under traditional rules of evidence, see *Krulewitch v. United States*, 336 U.S. 440 [1949]; *Fiswick v. United States*, 329 U.S. 211 [1946], the problem arising only because the statement was *** admissible against the declarant Evans***." (391 U.S. at 128 n. 3).

this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter. Surely the suggestion is not that *Pointer v. Texas*, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of 'all the dangers of inaccuracy which characterize hearsay generally.'***" (391 U.S. at 136 n. 12; emphasis by the Court).

The following year, in *Berger v. California, supra*, 393 U.S. 314, the Court unanimously gave *Barber v. Page* full retroactive application. In *Berger*, defense counsel had an opportunity to cross-examine the victim of a robbery when he testified against the defendant at a preliminary hearing. At time of trial, the witness was no longer in the state, and despite several attempts by the state to contact him, he did not appear at trial. The Court held that since the state had not made a sufficiently good-faith effort to obtain the witness' presence at trial, the introduction of his preliminary hearing testimony was unconstitutional. And in so finding, the Court stressed that "***one of the important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses" (*id.* at 315).¹⁵

We recognize that in all the Sixth Amendment confrontation cases to date, this Court has directly concerned itself only with instances where the accused was either completely denied the right to cross-examine a witness or denied the right to cross-examine at trial. The Court must now decide for the first time whether, when a witness appears and is cross-examined at trial, extrajudicial statements made by him and not adopted or affirmed on the stand may be admitted as evidence for the truth of the matter asserted.

¹⁵The State cites and seems to rely on *Harrington v. California*, 395 U.S. 250 (1969). The United States does not even cite the case, and it is difficult to ascertain its pertinency. That case merely held that proof of one defendant's guilt was so overwhelming that the unconstitutional admission of statements by co-defendants was harmless beyond a reasonable doubt.

We submit that while the Court has not directly faced under the Sixth Amendment the precise question at issue here, certainly the result reached by the California Supreme Court was pre-ordained by this Court's earlier decisions. The Court has continually stressed the importance of the incriminating evidence coming from the witness stand where the defendant and the trier of fact can look the witness in the face, weigh his demeanor, and assess his credibility (*Turner, Douglas, Barber*). It has recognized both the vital importance of cross-examination in ferreting out the facts (*Painter, Parker*) and the many dangers of hearsay evidence (*Bruton*). And it has emphasized that the personal appearance of the witness at trial is irrelevant if in fact the witness for some reason cannot be fully cross-examined (*Douglas*) or if the defendant cannot know the prior facts on which to base a meaningful cross-examination (*Wade, Gilbert, Smith*). The fact is that at least the statements excluded in *Bridges, Wade*, and *Gilbert*, and perhaps more, would all have been admissible if the view now espoused by the State of California and embodied in the California Evidence Code had been adopted by this Court in its prior decisions.

Exceptions to the Right

We recognize that the right of confrontation has its exceptions, and that such exceptions are not static and may be enlarged ***if there is no material departure from the reason of the general rule." *Snyder v. Massachusetts*, 291 U.S. 97, 197 (1934). This Court has not delineated generalized standards for testing the constitutionality of exceptions to the hearsay rule. But at least one Court of Appeals has done so, stating that

While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon *real necessity and adequate guarantees of trustworthiness*¹¹⁶, it does embody those requirements as es-

¹¹⁶The guarantee consists of "a circumstantial probability of trustworthiness." *Mathews v. United States, supra*, 217 F.2d at 417.

sential to all exceptions to the rule, present of future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule. [*Mathews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954) (emphasis added).]

One commentator has also argued that the exceptions cited in *Pointer v. Texas*, *supra*, indicate that necessity and reliability of the statement are the two necessary criteria for exceptions to the right of confrontation.¹⁷ Similarly, another has commented that the right of confrontation prohibits the admission of extrajudicial statements which were not originally made "under circumstances which vouch for [their] reliability and trustworthiness." Note, 22 Ark. L. Rev. 784, (1969).

The specific exceptions discussed or cited by this Court—prior testimony¹⁸ and dying declarations¹⁹—substantiate the position that an exception to full confrontation at trial must be supported by *both* necessity *and* reliability (*i.e.*, circumstantial probability of trustworthiness), as the United States recognizes in its Amicus brief (p. 7). This Court has further emphasized the need for necessity in *Barber v. Page*, *supra*, and the need for reliability in *Bridges v. Wixon*, *supra*.

¹⁷See Comment, "Federal Confrontation: A Not Very Clear Say on Hearsay," 13 U.C.L.A. L. Rev. 366, 372-379 (1966).

¹⁸See, e.g., *Mattox v. United States*, 156 U.S. 237 (1895), and *Barber v. Page*, *supra*. In this exception, necessity is provided by the unavailability of the witness, and reliability is provided by the previous opportunity effectively to cross-examine the witness.

¹⁹See, e.g., *Mattox v. United States*, *supra*. In this exception, necessity is again provided by the unavailability of the witness, and reliability is provided, at least in theory, by the belief that a man would not die with a lie on his lips.

(a) *Necessity*

A close examination of this Court's confrontation cases, which have imposed a very strict standard of necessity (*e.g.*, *Barber v. Page, supra*, and *Berger v. California, supra*), and of the hundreds of other federal and state cases dealing with necessity, show that the exception encompasses in almost every case²⁰ not the unavailability of certain testimony but the impossibility of producing the witness. Once the witness is present, it is no excuse to say that he refuses to testify to what the state wants him to, and that this refusal "necessitates" the introduction of his prior statements over his protest. Moreover, there are even exceptions to the "necessity" exception. An illegally obtained confession, for example, could never be introduced on some theory of necessity.

But perhaps most importantly, the entire concept of necessity carries with it the implicit assumption that, were the declarant actually testifying in court, he would *affirm* his hearsay statement.²¹ As one commentator has stated,

The basic rationale supporting use of prior recorded testimony is that the identity or similarity of issues and parties assures that the testimony given in the first proceeding will be *substantially identical to that*

²⁰For an example of alleged necessity other than unavailability of the witness, see the Federal Business Records Act, 28 U.S.C. § 1732-33, as amended 28 U.S.C. 1732(b) (Supp. V 1964). Necessity is said to be provided by the virtual impossibility of proof under strict hearsay principles where large bookkeeping staffs or bookkeeping machines are used. *Palmer v. Hoffman*, 318 U.S. 109, 112 (1943). This Court has not ruled on its constitutionality in criminal cases.

²¹Indeed, Judge Learned Hand, whose opinion in *DiCarlo v. United States*, 6 F.2d 364 (2d Cir. 1925), is often cited in support of the academic position (see Petitioner's Opening Brief at 19, 35), greatly limited *DiCarlo* by his later opinion in *United States v. Block*, 88 F. 2d 618 (2d Cir. 1937), in which he stated that prior statements of a witness could be admitted only if the witness in some way can rationally be said to have affirmed them on the stand.

which would be given in the subsequent proceeding. [Note, "The Use of Prior Recorded Testimony and the Right of Confrontation" 54 Iowa L. Rev. 360, 373 (1968) (emphasis added).]

Thus, the prosecution can rely on testimonial evidence from a witness only where that testimony is either given in court or would have been given in court. *Mattox v. United States*, *supra*, supports this proposition. After an initial conviction of the defendant had been reversed, the Court upheld the admissibility at the second trial of testimony given at the first trial by two witnesses who had died between trials.

To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarranted extent. [156 U.S. at 243.]

But there is a great difference between the use of a prior statement of a witness who is no longer available, and who presumably would give the same testimony, and that of a witness who now denies the accuracy of the prior statement and refuses to affirm that statement in the presence of the accused and the trier of fact. In the case of prior *inconsistent* statements, necessity is not present. Necessity requires more than the need of evidence to obtain a conviction. As shown above, it embodies a condition, a belief, that the declarant would tell the same story at trial. But here precisely the opposite situation obtains. Porter, the witness testifying at trial under the very conditions of confrontation designed to elicit the truth, whose memory of the events in issue is virtually as fresh as when he made his prior statements, in fact repudiates the accuracy of those statements.

To say that "necessity" is present in this case is to say that the State has a right to convict and that only by introducing a prior statement can it do so. There is no right to convict unless we are to assume that a defendant is guilty until he proves his innocence. If, as the State says, Porter's presence in court is sufficient to satisfy all of respondent's

confrontation needs, why is his presence in court not equally sufficient to satisfy the State's prosecutorial needs? We say the State must proceed with whatever it can produce on the stand, rather than using the witness as merely a conduit, an excuse, for the introduction of stale evidence, the circumstances surrounding which the trier of fact will never discover.

Why do we have a right of confrontation? Why do we prohibit convictions based on *ex parte* affidavits? We grant confrontation to the accused in the belief that when the witness is face to face with the accused and is telling his story in court, in full view of the trier of fact and subject to cross-examination, he will be most impelled to tell the truth, and his story can best be judged by the trier. But here, with all the conditions of confrontation met, we find that because Porter was under the influence of LSD, he could not have known what happened on the day the crime allegedly took place. Is this Court to say that the prosecution may avoid resting on the testimony resulting from the precise conditions for receiving testimonial evidence created by the fight of confrontation, and instead introduce testimony that did not result from those conditions?

(b) *Trustworthiness*

Even assuming arguendo that necessity exists, the State cannot use Porter's prior statements without showing that those particular statements were of a nature giving them a probability of reliability. This it cannot do.

Cross-examination at the preliminary hearing is not equivalent to cross-examination at trial, is not therefore an acceptable substitute for cross-examination at trial, and does not provide the necessary probability of trustworthiness to the testimony given at the hearing. The rationale supporting reliance on testimony at former hearings depends on cross-examination at that hearing to test adequately the veracity of the witness' testimony, thereby creating the degree of probable truthfulness constitutionally necessary to support admissibility at a later trial.

This Court has itself recognized that "a preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial," and has left open the question of the adequacy of using testimony from preliminary hearings under the prior testimony exception. *Barber v. Page, supra*, 390 U.S. at 725.

The Third Circuit has recognized a clear distinction between a preliminary hearing and trial:

In the case of a prior trial the goal of the cross-examiner is precisely the same as that which he would have followed at the second trial—acquittal of the defendant. At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilt beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing. [*Virgin Islands v. Acquino*, 378 F.2d 540, 549 (3d Cir. 1967).]

This reasoning is applicable in California.

In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—

an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistrate's court. The prosecution need show only "probable cause," a burden vastly lighter than proof beyond a reasonable doubt. [*People v. Gibbs*, 63 Cal. Rptr. 471, 475 (Cal. App. 1967) (citations omitted.)]

The California Supreme Court aptly stressed that cross-examination at the preliminary hearing will usually be conducted in a different manner than at trial, both for strategic reasons and because the issue at stake is significantly different. Moreover, it was noted that there is seldom time before a preliminary hearing to prepare adequately for cross-examination.

For these reasons, cross-examination of testimony at the preliminary hearing does not insulate that testimony from the constitutional inadequacies of all other prior inconsistent statements. It goes almost without saying that Porter's statement to Officer Wade, which was not even under oath,²² much less subject to contemporaneous cross-examination, not only carries with it no element of trustworthiness but calls for great skepticism and suspicion on the part of the Court. We discuss this more fully below.

Some of the cases and commentators cited by the State have remarked that generally a prior statement is to be considered more reliable than a later one, because it was made closer to the events about which it deals. But the instant case shows the danger of any such generalization. Here,

²² As to the total lack of value to be accorded a statement that was never even sworn to, see *Ferguson v. Georgia*, 365 U.S. 570, 587-589 (1961). Yet unlike the statement in *Ferguson*, that was introduced but not treated as evidence, the unsworn statement in this case was used as evidence of guilt—and may, in fact, have been the only evidence used by the court to convict, since we have no way of knowing whether the trial judge relied on the statement to Officer Wade, the statement at the preliminary hearing, or both (although they conflicted).

Porter made his first two statements implicating respondent while Porter himself was in police custody charged with a crime. His last two statements—during and after trial—either absolved or failed to involve respondent, and these statements were made while Porter was a free man, out of police control, and after the charge against him had been settled by his being placed on probation. Moreover, the entire time span between his first statement implicating respondent and the one he made at trial which failed to implicate respondent was only nine weeks. Therefore, the generalization that a prior statement should be regarded as more trustworthy utterly breaks down in the face of practical facts such as those present here. In terms of this specific case, probably the most trustworthy statement from a logical standpoint was the one Porter made *after* trial, when he was not duty-bound to speak at all, and when the facts he related squared nicely with other independent evidence brought out at the trial.

The authorities cited by the State also ignore the point that in cases where, unlike here, there is a long time lag between the first statement and the declarant's appearance at trial, it is all the more difficult to cross-examine him on his now-ancient prior statement. In other words, it is not merely a question of which statement is more trustworthy; the issue is also whether the defendant really is afforded the opportunity to which he is constitutionally entitled to discover the facts surrounding the statement being used to convict him. That opportunity diminishes the more ancient the prior statement becomes. The situation is further complicated by the fact that the prior statement is apt to harden with time and becomes increasingly difficult to modify by cross-examination, as the California Supreme Court has most convincingly demonstrated.

In any event, it is clear that merely because one statement is earlier than another, this does not provide the de-

gree of reliability to justify waiving a constitutional requirement.²³ And it certainly does not apply in this case.

Three Aspects of Confrontation

There are thus at least three important aspects of confrontation which the orthodox position protects but which are abandoned by the academic position here urged by the State. First, there is the requirement that the witness give the testimony upon which the prosecutor relies for conviction while the witness is confronted and cross-examined by the defendant at trial—a requirement designed to maximize the likelihood that the witness will tell the truth. Second, the ultimate trier of fact is allowed to view the demeanor of the witness while incriminating testimony is actually being given, so that its truth or falsity can more surely be determined. And, finally, the subjective moral impact of the courtroom is brought to bear to aid in eliciting the truth at the very time the all-important testimony is being produced.

None of these requirements is met in a case in which the rendition of the prior, incriminating statement is never observed by the trier of fact. In any effective sense, in fact, the accused is not even confronted with the witness against him when prior statements such as the one introduced here

²³ There may be types of prior statements, such as prior identifications (see *United States v. DeSisto*, 329 F.2d 929 (2d Cir. 1964); *People v. Ghould*, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960)), involving perceptions which are particularly subject to deterioration over time and which, as a class, might be constitutionally admissible (although, in such cases, because of the critical nature of the evidence developed, contemporaneous cross-examination might still be required, cf. *Gilbert v. United States*, *supra*). But this does not hold true for all prior testimonial recitations. For support of this distinction, see Note, 82 Harv. L. Rev. 472 (1968). Moreover, the problems of failing memory of witnesses in criminal cases should be addressed by meeting the constitutional requirement for a speedy trial rather than accepting delay and then diluting the constitutional right of confrontation.

are used against him. The body of one witness is the same as that of the other; but the witness who appeared at the preliminary hearing and purported to testify to one set of facts cannot in any meaningful sense be said to be the same witness who appeared at trial and stated unequivocably that he was under the influence of LSD at the time of the crime and could not possibly recount anything that occurred. Porter could not stand cross-examination at the trial on the statement he had given at the preliminary hearing; he could only offer that he did testify to those facts at the preliminary hearing, and therefore "that is probably what happened," but that actually his memory was not refreshed as to what really occurred at the time of the crime, and he was simply unable to be sure now what did occur in view of the condition he had been in at the time (n. 4, *supra*). Porter could stand cross-examination only in the sense that a complete amnesiac could be said to be able to stand cross-examination on past events; he was physically present in the courtroom, and that was all.

As for the statement Porter allegedly made to Officer Wade, the first question is whether Officer Wade told the truth about what Porter said to him. That issue could productively be explored on cross-examination of Officer Wade. The next question, however, is whether what Porter told Officer Wade about respondent's conduct was true. This could not productively be explored by cross-examination of Officer Wade, because he did not know whether the facts were true or not, or of Porter, because he remembered nothing of the events about which he reported to Wade.

If Porter was telling the truth at trial, it necessarily follows that his prior statements were of no evidentiary value whatever. This is because Porter's trial testimony taken as a whole makes it clear that the effect of the LSD at the very time of the alleged crime prevented him from *ever* knowing what occurred. "What is seen [after one takes LSD] is not found in objective reality, but arises from within oneself" (Appendix B, *infra*, p. B.4). In other words, Porter was legally unconscious or mentally absent at the

time of the crucial events, and therefore no subsequent story of what occurred could have any validity.

If, on the other hand, the trier of fact at trial determined that Porter was lying at trial, that still settles nothing insofar as respondent's guilt is concerned. The mere fact that Porter lied at trial would not necessarily mean that any prior statement was truthful. This is illustrated by the fact that Porter's two prior statements conflict with each other in substantial, fundamental respects, so that he might have been lying on one or both prior occasions *as well as* at trial. There was no trier of fact, presiding magistrate, or any one else present to observe Porter's demeanor when he gave his statement to Officer Wade, and the trier of fact at trial, an entirely different person than the presiding magistrate at the preliminary hearing, could hardly determine whether Porter was lying at that hearing. As this Court pointed out in *Mattox v. United States, supra*, 156 U.S. at 242-243, "The primary object of the constitutional provision in question was to present depositions or *ex parte* affidavits *** being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."²⁴

The trier of fact at trial in this case had no way of telling what Porter's "demeanor" had been when he gave his two prior statements, nor "the manner in which he [gave] his testimony." As a matter of fact, California law—and the law in numerous other jurisdictions as well—would prevent the trier of fact at trial from standing "face to face" with the witness prior to trial, even at a preliminary hearing, because preliminary hearings in California are con-

²⁴ Quoted with approval in *Douglas v. Alabama, supra*, 380 U.S. at 418-419, and *Barber v. Page, supra*, 390 U.S. at 721.

ducted by either a committing magistrate (as in this case) or a justice of the peace, whereas trials for offenses such as the one involved here are held before judges of the Superior Court. Thus, it is no accident that Porter's statement at the preliminary hearing was heard by one judge and his statement at trial by another; that would invariably occur in California and in many other states.

Practical Results of Adopting the State's Position

If this Court were to adopt the State's position, the impact on pre-trial procedures of all kinds would be incalculable. Prosecutors would take series upon series of *ex parte* statements from every available witness with the knowledge that the "right" story from the prosecutor's standpoint, once related, could constitute sufficient proof to convict at trial. Moreover, even if this Court were to reject the broad rule sought by the State and hold that a statement is admissible at trial only so long as the declarant had been cross-examined when the statement was made, it is no exaggeration to suggest that many pre-trial confrontations, examinations and proceedings which are now carefully restricted to the determination of extremely narrow issues would necessarily be expanded into full-dress hearings on a par with the trial itself. These hearings would include not only preliminary hearings but hearings on motions to suppress evidence, hearings on sanity and ability to stand trial, administrative agency proceedings where a statute or rule requires an opportunity for cross-examination (e.g., discharge of an employee), lineups (to a limited extent), etc.

Both prosecutors and defense counsel, anxious to preserve the testimony of all material witnesses, and to commit those witnesses to a specific story, would at every pre-trial opportunity attempt to put a raft of witnesses on the stand. Both prosecutors and defense counsel, once opposing witnesses had taken the stand, would be duty-bound to conduct full-scale, unlimited cross-examination on those statements for fear that, as in the instant case, it will be

too late at trial to confront the witness on a cold record. The result will be more witnesses, more testimony and more cross-examination at various proceedings prior to trial than we have ever known in our judicial system.

Other results will flow. For example, the Sixth Amendment right to counsel is intimately involved here. This Court has ruled that "**** today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"; that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial," and that "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *United States v. Wade, supra*, 388 U.S. at 224, 226, 227. Does it not follow as night follows day that if a statement given by a witness to a police officer can itself be used to convict a defendant at trial, regardless of what the witness says at trial, the defendant is entitled to have his counsel present when the witness is questioned?²⁵ If it is true, as this Court has said, that "in practice the issue of identity may **** for all practical purposes be determined there and then [at the lineup] before the trial" (*United States v. Wade, supra*, 388 U.S. at 229), is it not equally obvious that the issue of guilt may for all practical purposes be settled when the key witness first tells his story? The burden placed on both assigned and retained counsel to be present whenever such statements are made would be enormous—in fact, impossible. It would mean the appointment of counsel in indigent cases at a far earlier stage than the

²⁵See *White v. Maryland*, 373 U.S. 59 (1963), where a preliminary hearing was held to be a critical stage of the trial process because a plea of guilty at that hearing was later used at trial as evidence.

courts have required to date. It would even encourage prosecutors to put off charging a suspect until statements have been obtained from all material witnesses, thus making it impossible for subsequently-appointed defense counsel to participate in the taking of statements.

Moreover, the requisites that presently comprise the constitutionally guaranteed "effective assistance of counsel" would be extraordinarily expanded. For example, in the instant case, even though defense counsel may have deliberately steered clear of the subject of LSD at the preliminary hearing so as to retain a crippling weapon at trial, that same step might be deemed ineffective assistance if Porter's preliminary hearing statement could alone convict respondent. Imagine too the pressures this procedure would place on all defense counsel to prepare themselves adequately for various pre-trial proceedings. Under the Federal Magistrates Act, for example, it is required that in certain circumstances and unless there is consent to a continuance, the preliminary hearing must be held within ten days of the initial appearance of the prisoner before the magistrate (presumably at the time of his arrest). 18 U.S.C. § 3060, as amended by P.L. 90-577, § 303 (1968). How can counsel appointed subsequent to arrest possibly be prepared in that time for a full-scale cross-examination of the Government's witnesses (see n. 28, *infra*)? On the one hand, the preliminary hearing is supposed to provide a speedy means of determining the question of probable cause, and yet on the other, this Court has held it a denial of counsel and of due process not to permit counsel a reasonable time to prepare for trial²⁶ — a ruling equally applicable to a preliminary hearing if that is where statements to be used for proof of guilt are to be taken.

If the State's position is adopted, what is the fate of all the traditional distinctions this Court has drawn between preliminary hearings and trials? For example, in *Roviaro v.*

²⁶ *White v. Ragen*, 324 U.S. 760 (1945); *Reece v. Georgia*, 350 U.S. 85 (1955).

United States, 353 U.S. 53 (1957), the Court held that at trial, the police must reveal the identity of an informer because his possible testimony might be highly relevant to the case. Yet when the same question arose over similar testimony at a preliminary hearing, the Court held that the informer need not be identified. *McCray v. Illinois*, 386 U.S. 300 (1967). Repeatedly, the Court emphasized the difference between the two forums: "When the issue is not guilt or innocence, but, as here, the question of probable cause for an arrest or search ***" (*id.* at 305); "We must remember also that we are not dealing with the trial of the criminal charge itself" (*id.* at 307); "The *Roviaro* case involved the informer's privilege, not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself where the issue was the fundamental one of innocence or guilt" (*id.* at 309).²⁷ Yet if the preliminary hearing is to be converted into a forum where the statements taken can be used to convict at trial, the distinctions delineated by the Court in these cases break down, and the defendant must be allowed full recourse to all the facts at his preliminary hearing, to the same extent as he would be at trial.

Along a similar vein, it should be made clear that the expansion of pre-trial hearings might not only be at the behest of the prosecutor. In *Iowa v. Washington*, 160 N.W.2d 337 (Iowa 1968), for example, the defense attempted to introduce at trial the testimony of a witness for the State at a preliminary hearing. The witness was not available at trial. Pointing out that a preliminary hearing "is not a trial" and is "ordinarily a much less searching exploration into the merits of a case than a trial, because its function is the more limited one of determining whether probable cause exists to hold the accused for trial," (*id.* at 339), the court rejected the testimony.

²⁷To the same effect, see *United States v. Tucker*, 380 F.2d 206 (2d Cir. 1967); *United States v. Shyvers*, 385 F.2d 837 (2d Cir. 1967), cert. denied, 390 U.S. 998 (1968).

Similarly, in *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968), the defendant urged that the preliminary hearing be used as a means of discovery for the defense, but the Court of Appeals ruled that such a hearing has no "purpose other than to afford a person arrested upon complaint an opportunity to challenge the existence of probable cause for detaining him or requiring bail" (*id.* at 133). To the same effect, see *United States v. Conway*, 415 F.2d 158 (3d Cir. 1969), and *United States v. Motte*, 251 F. Supp. 601, 606 (S.D.N.Y. 1966).

In *United States v. Hinkle*, 307 F.Supp. 117 (D.C.D.C. 1969), the court pointed out that to turn the preliminary hearing into a forum for discovery and other purposes would mean that "the hearing would take on overtones of a trial." In view of the limited function of the hearing, the court turned down the defendant's argument that he had been improperly restricted in his cross-examination of the witnesses who appeared against him at that hearing. Yet if the State's position is upheld in the instant case, it is difficult to imagine *any* limitation on the defendant's right to cross-examine, since the direct examination can be introduced at the trial for the truth of the facts therein, and it may, as in this case, form the only evidence capable of convicting the defendant. Cross-examination would have to be at least as broad as—and perhaps broader than—if the direct testimony was being elicited at trial.

In this regard, there are important distinctions between civil and criminal proceedings that bear on the question at issue. Effective cross-examination depends upon preparation. The extensive discovery procedures available in civil cases, which can even permit the discovery of prior statements and the facts surrounding them, may well permit cross-examination at trial sufficient to judge the credibility of former statements. But discovery in criminal cases is still so limited that equally effective cross-examination is

extremely unlikely. Thus, there is an even greater need for requiring that in criminal cases the trier of fact be able to view the demeanor of the witness when he makes his statement, and to enable contemporaneous cross-examination at that time.

A perfect example of the limited role cross-examination has played in the past at preliminary hearings, as contrasted with that at trial, is supplied by this very case. The key fact surrounding the alleged offense, as it developed at trial, was Porter's use of LSD. For if Porter did in fact take LSD just prior to respondent's telephone call, Porter almost certainly would have had too scattered and confused an impression of subsequent events to warrant respondent's conviction. *Yet no question of any kind, either by the prosecution or by the defense, was asked Porter at the preliminary hearing about LSD.* The subject was simply never raised. Whether it was not injected by the defense because there had been insufficient opportunity to discover the facts,²⁸ or because the subject matter was being saved for

²⁸The record does not show when respondent was arrested, but counsel has been informed by the California Attorney General's Office that it was on January 31, 1967, the same day Porter was interrogated by Officer Wade. Respondent was arraigned the following day, February 1, at which time he was represented by the Public Defender. The record does not show, and counsel has not been informed, when respondent's trial counsel was retained, but even assuming that he was retained immediately following the arraignment, he would have had only six days to prepare for the preliminary hearing. In all likelihood, he had an even shorter period.

The question arises as to what would happen in cases like *Goldberg v. Kelly*, 38 U.S.L. Week 4223 (March 23, 1970), and *Wheeler v. Montgomery*, 38 U.S.L. Week 4230 (March 23, 1970) in which the Court held that welfare recipients are entitled to a *limited* hearing prior to the termination of benefits, and that the right to confront and cross-examine adverse witnesses is an essential part of the hearing. If any future hearing was even potentially involved (particularly of a criminal nature), and California's rule was in effect, the cross-examination at the "limited" hearing would have to be as broad and as unlimited as that at the future hearing itself; in order to

trial as a matter of tactics, or for some other reason, is not clear. The point remains that nothing was asked or said about LSD at that hearing; if it had been, the revelation of Porter's use of the drug at the time of the alleged offense might well have obviated the trial altogether.

As a matter of fact, in view of the long-term and periodic effects of LSD (see Appendix B, *infra*), Porter might well have been under the influence of the drug at the time of his statement to Officer Wade, at the time of the preliminary hearing, or both. It is important to note that while Porter was asked whether he was "on acid" or "under any narcotic sedation" at the time of trial (A. 12), he was not asked whether he had been similarly incapacitated at the time of his statement to Officer Wade or at the preliminary hearing. His confusion prior to trial is illustrated by the fact that he thought the bag he sold to Officer Dominguez had different markings and was constructed differently than the one identified by the officer himself (A. 56-57).

If the State's broad position is adopted—that any statement is admissible so long as the declarant is available for cross-examination at trial—the defendant is placed in the impossible position of not knowing and not being able to discover the circumstances under which the statement was rendered. In the instant case, for example, Officer Wade said he did not think Porter was under the influence of LSD at the time he made his first statement,²⁹ but the

protect the recipient's interest. Parenthetically, we note that a statement made in *Goldberg* about caseworkers is particularly applicable to Officer Wade in the instant case: "The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him" (39 U.S.L. Week at 4227).

²⁹ He did admit, however, that Porter "was between the symptom of being sleepy and between the symptom of being high" (A. 40).

trial judge was quick to point out that Officer Wade was hardly an expert (A. 42). How could respondent possibly have determined whether Porter was in fact under the influence of LSD at the time this crucial statement was made, when neither he, his counsel, nor any one else was present? Similarly, Porter in his fourth statement alleged certain police threats that resulted in his first statement,³⁰ and yet, since Officer Wade would hardly have admitted making any such illegal threats, respondent could hardly have determined the true facts at trial. The threats, in fact, might have been made by other officers without Officer Wade's knowledge, so that he could hardly have testified to the facts. Thus, adoption of the State's position would be an open invitation to the use of all kinds of physical and psychological methods for extracting untruthful statements from persons prior to trial and out of the sight and control of proper authorities.

It should be stressed, too, that the California statute does not confine itself to hearsay statements made to police officers or other public officials. Just as Porter wanted to "get back" at respondent (A. 60-61, 65, 69), anyone else who wanted to get back at either respondent or Porter or both could have come into court and testified to a statement which Porter allegedly made to him, and this testimony could provide the sole evidence of guilt. *The California statute does not even provide that the declarant acknowledge making the statement*, so that the statement could be entirely fabricated out of thin air, the declarant could forcefully swear that it never was made, and yet the defendant could be convicted on the basis of it.

³⁰ "Later, when I was arrested and was in custody, the police kept telling me that they knew it was JOHN GREEN I was involved with and that unless I implicated him that they would see that I was out of circulation for a long time ****" (A. 99-100).

Other results may well follow from approval of the State's position. Since the preliminary hearing is dispensed with in those cases where an indictment is timely returned, approval of the State's position could encourage delays in indictments so that the prosecution can pin down all the statements it needs from material witnesses. Or conversely, if the prosecutor is fearful that statements favorable to the defendant may be presented at a preliminary hearing and thus freeze the position of those witnesses, he could intercede with a grand jury indictment and thus eliminate the preliminary hearing altogether. "It has been consistently held that an accused has no constitutional right to a preliminary hearing." *United States v. Motte*, 251 F. Supp. 601, 603 (S.D.N.Y. 1966); and see *Dillard v. Bomar*, 342 F.2d 789 (6th Cir.), cert. denied, 382 U.S. 883 (1965).

Finally, one extraordinary result of an acceptance of the State's position would be that the State would actually benefit by producing a lying witness—the very type of witness Porter was judged to be by the trial court and the prosecutor (n. 2, *supra*). Assume that lying witness X gives a prior statement either to a police officer or to a presiding magistrate. Any jury contemporaneously hearing that statement, watching X's demeanor as he gave it, would recognize his story as a complete fabrication. X takes the stand at trial and either recants his prior statement or gives a different version. Even though X is still lying, the State can use the inconsistency as an excuse to introduce the prior statement and thereby "prove" the matters related in that statement. The jurors can tell that X is lying now; but there is no way they can tell whether he was lying when he made the prior statement. Because X is now lying, and because he gave a different version on a prior occasion, the jury accepts the prior version and the defendant is convicted—on the basis of a lie.

Another unusual and unfortunate result of reversal by this Court would be that prosecutors could be in a stronger position relying on pre-trial statements than on testimony

given directly at trial. To demonstrate, suppose witness X takes the stand and testifies *at trial*, under direct questioning by the prosecutor, to all the facts which Porter gave about respondent at the preliminary hearing in the instant case. At the conclusion of this direct examination, the following cross-examination takes place:

Defense counsel: "Is it not a fact, Mr. X, that some twenty minutes prior to the defendant's telephone call to you, you took LSD?"

A: "I admit it, yes."

Q: "You had taken LSD before?"

A: "Yes."

Q: "And as a result of taking LSD, you became disoriented on this occasion?"

A: "Yes."

Q: "So that in truth you cannot remember whether the defendant even came to your house after that call?"

A: "I agree."

Q: "Or whether, if he came, he brought anything with him?"

A: "I admit it."

Q: "Or whether anyone told you where to find marijuana?"

A: "You're right, I can't be sure."

Q: "Or, for that matter, where you got the marijuana."

A: "That's true."

Is there the slightest question but that, following this cross-examination, the direct testimony would be stricken as admittedly untrue or, at the very least, totally discounted by the trier of fact? No appellate court would allow a conviction to rest on such direct testimony immediately followed by the cross-examination above. Yet because in the

instant case the "direct testimony" came in not as trial testimony at all but as part of a statement from some prior proceeding, it attains, under the State's theory, some sacrosanct, unimpeachable status. Even if it were to be conceded that in general (although not here, and see pp. 35-37, *supra*) an earlier statement has some stronger element of trustworthiness than a statement made later in time; surely this element is heavily outweighed by the fact that in the case of the later statement, the *entire* testimony is given under the eyes of the trier of fact. Yet here, the earlier statement becomes, under the State's approach, more invulnerable to attack than if put forward at trial. We submit that this makes no sense whatever.

Much of the discussion above has dealt with pre-trial proceedings at which defense counsel would have the right to cross-examine. It must be emphasized, however, that the California statute is in no way restricted to statements as to which there has been prior cross-examination; and the State is pressing for a rule that would allow *all* statements in evidence so long as the declarant appears at trial and gives testimony in any way inconsistent with the prior statement. Therefore, any statement given to any one prior to trial—even someone not in authority—is potentially admissible. In addition, the following are just a few of the types of actions that might result in statements being given to various officials and not subject to cross-examination prior to trial:

- Police questioning of a "suspicious person" on the street with or without a "frisk."
- Police questioning of possible witnesses either at or away from the police station.
- Pre-lineup confrontation.
- Testimony given to a magistrate designed to obtain a search or arrest warrant.
- Police questioning of a person after arrest when that person volunteers information even after receiving the *Miranda* warnings.

- A Grand Jury proceeding.
- An Inquest.
- Administrative agency hearing or proceeding concerning the possible discharge of an employee where the agency is not required by statute or rule to permit cross-examination.
- Hearings or proceedings considering the disbarment or censure of an attorney by a Bar Association Committee on Admissions and Grievances.
- Court hearing on whether or not to grant bail pending trial, where the judge is permitted to rely on written or oral statements about the defendant which are not subject to cross-examination.
- Staff conferences at a mental hospital to consider mental competency or sanity.
- Statements given to investigative commissions such as the Warren Commission.
- Sentencing proceeding in a criminal case where the judge bases the sentence in part on a Pre-Sentence Report containing statements of various witnesses not subject to cross-examination.
- Probation or parole hearings in which the Board relies on statements about the defendant which were not subject to cross-examination.

Quite obviously, the proliferation of pre-trial and post-trial statements that may be used at trial or in other proceedings will be quite extraordinary—and all to the detriment of the fair and orderly administration of justice as well as the rights of those most in need of protection.

CONCLUSION

Nine appellate judges below—six on the California Supreme Court and three on the District Court of Appeal—unanimously ruled that Section 1235 of the California Evidence Code, under the facts of this case, denied respondent his right to confrontation under the Sixth Amendment to

the United States Constitution. We urge this Court to hold the same. Respondent was effectively denied his right to subject the statements that convicted him to the type of searching, contemporaneous cross-examination that has been a hallmark of our constitutional system. He was denied the right to have the trier of fact judge the manner and demeanor of the witness as he made the incriminating statements. All of the safeguards were missing; all of the conditions tending toward truthfulness were lacking. There was, as in *Bridges v. Wixon*, a fundamental unfairness as well as a denial of specific constitutional rights. In addition, the view pressed by the State will, if adopted, result in a great perversion of all pre-trial proceedings that have heretofore been so carefully limited.

For each and all of these reasons, we respectfully pray that the judgment of the California Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved.

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Evidence Code, Section 770.

§770. Evidence of inconsistent statement of witness.
 Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code, Section 1235

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1965, c. 299, § 1235.)

California Health and Safety Code, Section 11532.

§ 11532. Every person of the age of 21 years or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale or peddling any marijuana, or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any marijuana to a minor, or who induces a minor to use marijuana in violation of law, is guilty of a felony punishable by imprisonment in the state prison from 10 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.

If such a person has been previously convicted once of any felony offense described in this division or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previ-

ous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison.

If such a person has been previously convicted two or more times of any felony offense described in this division or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 15 years to life and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 15 years in prison.

(Added by Stats. 1959, Ch. 1112; amended by Stats. 1961, Ch. 274.)



APPENDIX B

Excerpts from "LSD-25: A Factual Account, published by the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, pp. 11-12 (1969) (emphasis added):

Although the exact biochemical changes that take place within the human body when LSD is ingested are still a mystery in part, much is known about the ways in which the drug produces its effects.

The effects of d-lysergic acid diethylamide (LSD) may be divided conveniently into three groups: central, direct (or peripheral), and neurohumoral.

Central Effects. These are the most readily observable effects of LSD, called central because of LSD's action on the central nervous system. This action is capable of producing, in turn, a wide range of physiological effects. Central effects include:

- * Stimulation of electrical activity in the brain, as reflected by activation of the electroencephalograph, the apparatus that detects and records brain waves.
- * Stimulation of that part of the brain called the reticular formation, which results in heightened sensitivity to sensory stimuli coming from the outside through the sense organs. *This action causes distortion of what is perceived, leading to hallucinations and various other psychological changes.*
- * Stimulation of those parts of the brain called the brain stem, the medulla and the midbrain. Stimulation of these structures causes the pupils to dilate (a common effect of LSD), body temperature to rise, hair "to stand on end," the sugar content of the blood to increase, and a rapid heart rate with elevated blood pressure.
- * Nausea, dizziness, headache, and sometimes loss of appetite.
- * Stimulation of certain reflexes, such as the knee jerk.

* Decreased muscular coordination and vomiting, especially when large doses of LSD are taken. A fine tremor of the fingers and hands may occur.

Direct Effects. These consist of direct stimulation of smooth muscle resulting in muscular contractions (Smooth muscle refers to the musculature of the intestinal tract, the blood vessels, the uterus, the bladder, and certain other organs. Such muscles are often called involuntary muscles because there is very little or no control over them. Smooth muscle does not need conscious efforts to perform its work). The direct effects of LSD on smooth muscle are also called *peripheral* effects because they are exerted directly on muscle without regard for its control by the brain and spinal cord. This contracting effect of LSD on smooth muscle is dramatically visible in laboratory experiments where blood vessel tissue and uterine tissue from various animals are used to demonstrate the action.

Neurohumoral Effects. These are effects caused by nerve cell transmitters. Transmitters change electrical energy to chemical activity, and vice versa. The principal neurohumoral effect produced by LSD is potent inhibition of a substance called *serotonin*. Serotonin is present naturally in the body, and is said to play a role in the transmission of impulses from one nerve to another in the brain.

The inhibition of serotonin by LSD—that is, the interference with serotonin's ability to aid in the transmission of nerve impulses—was once thought to be the specific mechanism by which LSD caused behavioral and psychic changes. However, the property of LSD had been shown experimentally not to be a direct cause of changed behavioral phenomena. This conclusion is based on the fact that other derivatives of lysergic acid (Brom-LSD, for example), which are even more powerful inhibitors of serotonin, do not produce the potent psychological effects that LSD does. This does not mean that the inhibition of serotonin plays no part in the behavioral changes produced by LSD. It merely indicates that not enough is known about serotonin inhibition.

by LSD and that additional facts must be discovered before the role of serotonin is fully understood.

Mixed Messages

Whether by inhibition of serotonin or by other means, it has been established that LSD produces a peculiar effect on the transmission of sensory impulses to the brain. This has been demonstrated in laboratory experiments on sensory response of animals under the influence of LSD.

The normal functioning of the nerves of the visual system in animals can be treated by a series of electrodes placed at various points in the system. When a flash of light hits the eye, these electrodes measure the resulting electrical impulses that pass from the eye's retina (the light-sensitive area) to the brain. During this journey the electrical impulses make their way from the retina to other points in the system: the optic nerve, the geniculate body, and the optic radiation pathway. The impulses lead eventually to the association cortex in the brain where the image or stimulus is interpreted.

When an animal is given LSD, electrical measurements along the optic nerve show that an intensified impulse is received from the retina. Such an exaggeration of the impulse is not due to the intensity of the external stimulus or the source of light but to changes in the receptivity of the visual system which also occur when certain drugs are taken. But unlike the effect of other drugs, the electrical impulses produced continue to increase under LSD influence and to become more distorted as they travel along the optic pathway to the brain. This indicates that LSD has a unique physiological effect on those parts of the visual system called the geniculate body and the optic radiation pathway.

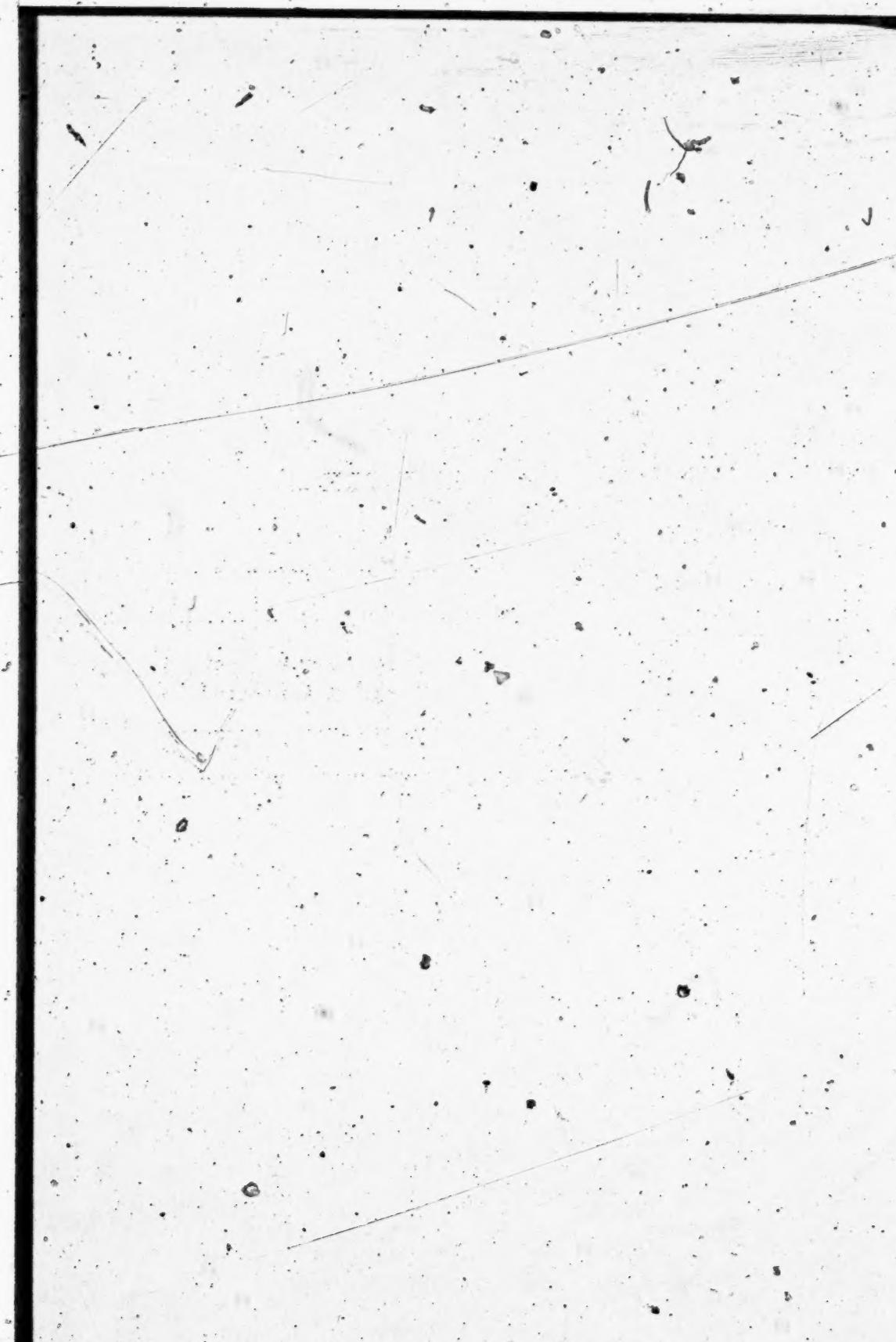
Moreover, when hearing and sight are tested in animals under the influence of LSD, the character of the impulses received and transmitted by one organ are found to be affected by the impulses to the other. In other words, sights reaching the brain from the eye are changed by sounds, and sounds are changed by what the eye apparently sees. This

is the effect reported by users of LSD who "see" music, "hear" color, and "feel" visual images. These mixed messages to the brain exhibit the phenomenon in psychology commonly called synesthesia.

Hallucinations

Does LSD really have the power to produce hallucinations—that is, sensory perceptions or illusions having no basis in reality, such as hearing sounds or seeing objects when none are there? The answer is that it does, though the effect is not as common as that of pseudo-hallucinations. The existence of true hallucinations has been proven by still another experiment on the transmission of sensory impulses.

When the eye is disconnected from the optic nerve in an undrugged experimental animal, impulses passing through the optic nerve abruptly cease. If an animal with detached optic nerve is given LSD, the impulses are somewhat diminished but nevertheless still occur. Since the optic nerve has been disconnected from the eye, these impulses cannot possibly be the result of external stimuli. What is seen is not found in objective reality, but arises from within oneself. This is what is meant by the term hallucination. Experiments conducted with totally blind human beings using LSD yield similar results.



SUBJECT INDEX

	Page
Introduction	1
Factual Considerations	2
The Orthodox View of Common Law Evidentiary Rules Should Not Be Declared a Command of the Constitution	4
Conclusion	11

TABLE OF AUTHORITIES CITED

	Cases	Page
*Barber Case, 390 U.S. 719	2
Bridges v. Wixon, 326 U.S. 135	5
People v. Johnson, 68 Cal. 2d 646, 441 P. 2d 111, 68 Cal. Rptr. 599	8, 9
Pointer Case, 380 U.S. 400	2
State v. Saporen, 205 Minn. 358, 285 N.W. 898	5
Miscellaneous		
Report of the Committee to Study the Proposed Rules of Evidence for the United States District Courts and Magistrates of the American College of Trial Lawyers (February, 1970), p. 4	10
Statute		
United States Constitution, Sixth Amendment	2, 8
Textbooks		
82 Harvard Law Review, pp. 236-237	5
McCormick on Evidence, p. 81	5
15 Wayne Law Review, pp. 1090-1091	7
15 Wayne Law Review, p. 877	8

IN THE
Supreme Court of the United States

October Term 1969
No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

On Writ of Certiorari to the Supreme Court of the
State of California.

PETITIONER'S REPLY BRIEF

Introduction

Petitioner will only briefly reply to the matters set forth in the respondent's brief, relying primarily on the arguments in the Opening Brief and in the Brief of the United States as Amicus Curiae.

The petitioner argued in the Opening Brief that the defendant in the instant case was confronted with the witnesses against him when he had an opportunity at trial, which he exercised, of cross-examining the witness whose prior inconsistent statements were received in evidence. In disputing this contention respondent states ((Br. for Resp. p. 12) "Since respondent was denied contemporaneous cross-examination before the trier of fact as the statements that convicted him were in-

troduced, he was denied his right of confrontation under the Sixth Amendment to the United States Constitution." He then argued (Br. for Resp. pp. 12-13) that the decisions of this court, including *Pointer*, 380 U.S. 400, and *Barber*, 390 U.S. 719, "clearly require *contemporaneous* confrontation and cross-examination before the trier of fact." (Emphasis added.)

By this argument he attempts to support the Supreme Court of California. However, he does not tell us where the word "contemporaneous" comes from. It clearly is not from the Sixth Amendment. It was not contained in *Pointer*.

In *Barber*, the holding was that confrontation includes both the opportunity to cross-examine the witness and the occasion for the trier of fact to weigh the demeanor of the witness. There is nothing in the Sixth Amendment or the recent cases of this court that requires a "contemporaneous utterance" by the declarant before the trier of fact. The right of confrontation makes the declarant available to the defendant to cross-examine and places him before the trier of fact in order to afford the jury the occasion to weigh the demeanor of the witness. Any other considerations should go to the polities to be utilized in fashioning rules of evidence.

Factual Considerations

In the instant case it is not denied that the declarant whose prior statements are in issue confronted the respondent at the trial, was subject to cross-examination during the People's case in chief and also as part of the respondent's case; that the declarant was present in court with the respondent and that the trier of fact

(the trial judge) was afforded an adequate opportunity to assess the credibility of the witness. (See Opening Brief, pp. 4-8.)

There is no question that the minor in this case was furnished a narcotic (marijuana) and the People's case established the respondent as the source of this narcotic. The witness was cross-examined as to his statements and the respondent was afforded the opportunity for further cross-examination after the People's case had closed.

Respondent has observed that the testimony at the preliminary and the statement to Officer Wade differed in respect to whether the narcotic had been brought over to Porter's house by Green or whether Green had merely pointed it out and Porter had gotten it at Green's parents house. The respondent, as he may properly do, has referred to the Reporter's Transcript of the Preliminary Hearing which is part of the record before this Court. Petitioner also would note that at the preliminary hearing, where the respondent was afforded the opportunity for cross-examination with counsel, counsel asked the witness Porter if he had ever previously told the officers that he picked up the sack of marijuana at Green's parents house. (Preliminary Transcript p. 28, line 14 to p. 29, line 1.) Porter replied that he only said he got it from him. At the trial Green was afforded ample opportunity to probe into this matter and to bring this to the attention of the trial court, if he so desired. This portion of the preliminary hearing record was not read to the court. However, contrary to the footnote in the California Supreme Court's opinion, Appendix, p. 112, and the statement page 14, Resp. Br., a significant part of the cross-

-4-

examination of Porter at the preliminary hearing was read to the court. (Appendix pp. 18-22.)

The trier of fact did not have to accept all of the testimony of any witness as the gospel truth. He was certainly in a position to judge of the credibility of the witness Porter, as of all other witnesses at the trial, and to reject testimony determined to be unworthy of belief. This court should not be induced by speculative arguments to attempt to reweigh the testimony and determine its worth. In an attempt to have this court reject the testimony of Porter attention is called to his statements in court of the use of LSD. It must be noted that when the court asked Porter if it was the use of LSD that made his memory bad, Porter answered "No, I have always had a not very good memory." (Appendix, p. 26.) And officer Wade's testimony was that Porter was sober (Appendix, p. 42); that in the officer's opinion he was not under the influence of LSD when he made the statement of January 31, 1967 (Appendix pp. 38-39); that Porter was "acting normal like you and I." (Appendix p. 40.)

The Orthodox View of Common Law Evidentiary Rules Should Not Be Declared a Command of the Constitution

Petitioner will not elaborate on the development of the right of confrontation and of the rules against hearsay set forth in the briefs of the parties herein and in the Amicus brief. It is sufficient to note that it has been suggested that insofar as the confrontation clause and the hearsay evidence rules protect criminal defendants they have generally been treated as though

coextensive although they have not been held to overlap: It has been noted that a possible distinction is apparent: confrontation is limited to the right to confront the witness in the presence of the jury; hearsay is primarily concerned with the reliability of out of court statements whose admissibility is not dependant on whether the declarant testifies in court.

82 Harv. L.R. pp. 236-237.

Petitioner submits that the arguments for and against the orthodox view which holds previous inconsistent statements of a witness only admissible to impeach and not evidence of the facts stated are not arguments to the constitutional issue herein. Much of the authority and arguments set forth in respondent's brief, including the "Practical Results of Adopting the State's Position" (Resp. Br. pp. 40-51), are of this nature. (See discussion of *Bridges v. Wixon*, 326 U.S. 135 in Amicus Brief, pp. 21-23, 28-29). This is true of *State v. Saporen*, 205 Minn. 358, 285 N.W. 898, quoted in Resp. Br. pp. 22-24. Although Minnesota has a constitutional provision on confrontation, the decision does not purport to introduce a constitutional straight jacket on the evidentiary issue. Professor McCormick, (Evidence, p. 81) summarizes the arguments in favor of the orthodox view as presented by Judge Stone in Saporen, and then refutes them in the counter-argument as follows:

"First, the oath and liability to punishment for perjury are wanting.

"This must be granted, and the question is whether the want is fatal in view of (1) the fact that the prior statement was nearer to the event,

and hence fresher in memory, than the present testimony and (2) the opportunity to cross-examine.

"Second, the 'principal virtue' of cross-examination 'is in its immediate application of the testing process.' There was ~~no~~ *immediate* opportunity of cross-examination of the previous statement.

"But another virtue of cross-examination is in its opportunity to require the witness to explain the discrepancies of conflicting statements, and when this process is afforded, it seems that the earlier statement should at least stand equal with the later.

"Third, the unrestricted use as evidence of impeaching statements would 'increase both temptation and opportunity for the manufacture of evidence.'

"But it must be remembered that this temptation exists almost equally under the orthodox rule, since the statements will come in to impeach and will be considered by the jury as evidence, regardless of contrary instructions, if there is an issue of fact to submit.

"Fourth, if the hearsay rule is satisfied as to prior contradictory statements, it is equally so as to statements consistent with his testimony, and would lead to their admission as substantive evidence, and this, presumably, he would argue, would still further open the door to the evil last mentioned, that of manufacturing evidence, by securing successive statements from the witnesses.

"To this it may be answered that the extension suggested seems a logical one, and it is accepted

in the provisions of the English Evidence Act of 1938 and the Uniform Rule. Such an extension may encourage further the early taking of written statements from the witnesses, and the securing so far as possible of additional statements on fact-questions later revealed in the progress of investigation. These practices, however, are precisely those followed by diligent parties and counsel under the present system. It is hard to see how the present inducements to unscrupulous parties to put pressure upon crucial witnesses to change their stories will be materially increased. If witnesses are induced by such an extension more often to put in writing their recollection of the facts, even though prodded thereto by interested parties, and if the statements are given consideration more nearly equal with the later testimony, it seems probable that on the whole the interests of truth will be served." (Footnotes omitted.)

The commentators in 15 Wayne Law Review, at pages 1090-1091, in discussing the Proposed Rules for the Federal Courts (Rule 8-01(c)(2) said,

"However, there are compelling reasons for admissibility as substantive evidence. The requirement that the declarant testify at the hearing, that he be available for cross-examination as to the prior statement, and that the prior statement be inconsistent with his testimony allows a complete exploration of both statements while the witness is on the stand. An opportunity exists for declarant to explain any inconsistency, while cross-examination respecting the prior statement will satisfy

any procedural or constitutional objections. The presence of the declarant in court makes possible the observation of his demeanor which will aid in evaluating his credibility. Under these circumstances the reasons for invoking the hearsay prohibition are not present.

"There is also reason to believe that the prior statement was most accurate because it was made nearer in time to the event than the present testimony. Clearness of memory would vary with the time lapse between the event, the inconsistent statement, and the testimony at the hearing. In addition, the greater the lapse of time, the greater the chance of distortion through corruption, false suggestion, intimidation, or sympathy." (Footnotes omitted.)

In discussing *People v. Johnson*, 68 Cal. 2d 646, 441 P. 2d 111, 68 Cal. Rptr. 599, upon which the California Supreme Court in *Green* relied in holding the Sixth Amendment violated, the commentator in 15 Wayne Law Review, p. 877, notes the fallacious premise upon which that case is based:

"The instant court notes that Pointer and Douglas require that Sixth Amendment standards be followed in the states, but refers to *Goings v. United States*, as authority for the proposition that the substantive use of prior inconsistent statements exceeds the limitations of the confrontation clause. However, *Goings* is not authority for such a proposition since the case was decided on common law evidentiary rules. The court merely adhered to the orthodox interpretation that the

hearsay rule precluded the substantive use of such statements. The only reference made to the confrontation clause is dictum contained in a footnote, implying that the Sixth Amendment may also exclude the substantive use of prior inconsistent statements. Unlike the circuit court in *Gatings*, which merely ruled on evidentiary rules applicable in federal courts, the Supreme Court, in *Douglas*, provides a *constitutional* evaluation of state evidentiary rules. The clear purport of that holding indicates that had the witness affirmed the extra-judicial statements as his, the statement would have been constitutionally admissible as substantive evidence, either in the form of a prior inconsistent statement or prior consistent statement depending on the witness' in-court testimony. The intended use of section 1235 in the principal case clearly satisfies the doctrine set forth in *Douglas*. Both witnesses acknowledged that they made the out-of-court statements and, therefore, the opportunity to cross-examine them on these statements was not only available but, in fact, extensively used."

In concluding that the holding in *Johnson* was specious the commentator said:

"While the instant court cites no relevant authority to affirm its position that section 1235 is unconstitutional, it does support its position that the statutory provision is the embodiment of a disputed hearsay rule exception. However, the hearsay rule with all its traditional interpretations is not under consideration since the legislature already resolved the issue. The issue under consid-

eration is the applicability of the confrontation rule. The guidelines set forth in *Douglas v. Alabama* clearly govern use of the statements involved in the principal case. The confrontation clause, as interpreted by Douglas, merely requires the opportunity, at some point, to cross-examine witnesses. When this opportunity is available, constitutional requirements are fulfilled. Perhaps the instant court's disapproval of the legislatures rejection of the traditional approach to the hearsay exception induced the attempt to find inherent factors mitigating against adequate confrontation. This approach only resulted in forcing the court's arguments to be comprised of irrelevant premises and, therefore specious conclusions."

In closing this brief petitioner submits that the dire predictions made by respondent as "practical results" of adopting the position of petitioner find no support in the authorities cited by respondent and have been rejected by the distinguished legal scholars who have advanced the "academic" view of this evidentiary question, by the learned judges and experienced trial lawyers who have studied the matter and whose conclusions are contained in the various legal journals cited by petitioner and amicus and by the committee on Proposed Rules for the Federal Courts and the Committee of the American College of Trial Lawyers. (See the Report of the Committee to Study the Proposed Rules of Evidence for the United States District Courts and Magistrates of the American College of Trial Lawyers, February, 1970, page 4.)

Conclusion

Petitioner joins with the United States as Amicus Curiae in submitting that the prior inconsistent statements in this case were constitutionally admissible and in requesting that this cause be remanded to the California Supreme Court for proceedings not inconsistent with this Honorable Court's opinion.

Respectfully submitted,

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